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Constitutional Law—Use Tax—Collection in Interstate Commerce.

Section 21 of the Iowa Use Tax Act[1] provides that the State Board of Assessment and Review may, upon failure of any retailer maintaining a place of business within the state to collect from the user or purchaser and remit to the Board the tax imposed upon the use of goods within the state, revoke the permit of such retailer to do business within the state. *P* maintained twelve retail stores in Iowa and had complied with the provisions of the Act as to all sales of mer-

[1] Iowa Acts 1937, c. 198 (passed as a supplement to the Sales Tax Act, Iowa Acts 1937, c. 196).

chandise in such stores. But it had not collected the tax imposed by the Act determined by the purchase price of the sales made by its mail-order establishments in other states directly to residents in the State of Iowa. *P*, having failed to heed the order of the Board to show cause why it should not comply with the provisions of the Act, filed suit[2] in a federal district court alleging the unconstitutionality of this section, and seeking a temporary injunction restraining the defendants from revoking the licenses of its retail stores within the state. *Held*, suit should be dismissed for lack of jurisdiction, federal district courts being denied by statute[3] jurisdiction to enjoin the collection of any state tax where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.

The use tax is a comparatively new form of taxation designed to supplement the sales tax and to eliminate its evasion by persons making their purchases outside the state. It was foreshadowed by the terms of several of the gasoline tax laws which taxed the storage, withdrawal from storage, and use of gasoline, the sale of which might not be directly taxed on account of the restrictions of the interstate commerce clause. The use tax is levied on the same classes of property and the rate is the same as that of the sales tax. Generally, tax liability is placed upon the person storing, using, or consuming certain types of tangible personal property within the state, wherever acquired, credit being allowed for sales tax already paid within the state, and in some instances for a like tax paid on purchases made out of the state.[4]

The constitutionality of the use tax has been sustained against the claim that it violates the commerce clause of the Federal Constitution.[5] While the tax is imposed on the use of property within the state, the retailer is required to collect it from the user and pay it to the state. This method of collection has been repeatedly sustained in its application to sales made by the retailer called upon to collect and pay the

[2] Sears, Roebuck & Co. v. Roddewig, 24 F. Supp. 321 (S. D. Iowa 1938).

[3] REV. STAT. §§563, 629 (1875), 28 U. S. C. A. §41(1) (Supp. 1937).

[4] Kan. Laws 1937, c. 375, §4(c); Miss. Laws 1938, c. 114, §6(b); Utah Laws 1937, c. 114, §4(d); Wash. Laws 1935, c. 180, §32(c).

[5] Henneford v. Silas Mason Co., 300 U. S. 577, 57 Sup. Ct. 524, 81 L. ed. 814 (1937), (1937) 1 MD. L. REV. 263, (1937) 35 MICH. L. REV. 1385, (1937) 10 So. CALIF. L. REV. 516. Further authority on the validity of a tax imposed upon the use of goods after interstate commerce has ceased and they have come to rest in a state may be found in: Gregg Dyeing Co. v. Query, 286 U. S. 472, 52 Sup. Ct. 631, 76 L. ed. 1232 (1932), 84 A. L. R. 839 (1933); Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. ed. 730 (1933); Edelman v. Boeing Air Transport, Inc., 289 U. S. 249, 53 Sup. Ct. 591, 77 L. ed. 1155 (1933); Monamotor Oil Co. v. Johnson, 292 U. S. 86, 54 Sup. Ct. 575, 78 L. ed. 1141 (1934); Southern Pac. Co. v. Corbett, 23 F. Supp. 193 (N. D. Cal. 1938); Pacific Tel. & Tel. Co. v. Corbett, 23 F. Supp. 197 (N. D. Cal. 1938); Powell v. Maxwell, 210 N. C. 211, 186 S. E. 326 (1936), note (1936) 15 N. C. L. REV. 73.

tax.[6] The question left undecided in this case is whether the state may require a retailer making sales within the state, under penalty of revocation of its license to do business, to collect and pay an admittedly valid tax growing out of a transaction between an extrastate seller, engaged only in making mail-order sales direct to local buyers, where the power of the state over the local retailer grows out of the fact that the local retail business and the mail-order business are conducted by the same corporation. If this device is sustained it should play an important part in making possible the collection of the use tax from extrastate mail-order houses where they maintain local establishments for sales at retail.

Apart from the problem whether the licenses of the retail stores may be revoked for the default of the company in connection with the mail-order business, the question arises whether the duty of collecting use taxes can be imposed upon such a mail-order enterprise in the first place without placing a burden on interstate commerce. Two recent federal decisions furnish very persuasive authority for an affirmative answer. In *Monamotor Oil Co. v. Johnson*[7] the complainant was a foreign corporation engaged in shipping gasoline into Iowa for the purpose of resale to consumers and dealers who sell to consumers. It sought an injunction against the enforcement of the provisions of an act making it a collector of an excise tax, imposed on the use of gasoline as motor fuel within the state, as regards gasoline shipped by it from out of state to buyers in Iowa. The United States Supreme Court denied the injunction and refused to support the complainant's contention that such a requirement was unconstitutional by saying: "The statute obviously was not intended to reach transactions in interstate commerce,[8] but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant." Although the Court in the *Monamotor* case was willing to uphold the imposition upon a foreign corporation of the duty of collecting a tax upon property shipped to its customer for resale within a state, it is necessary to go a step further to hold that

[6] Citizens Nat. Bank v. Kentucky, 217 U. S. 443, 30 Sup. Ct. 532, 54 L. ed. 832 (1910); Pierce Oil Corp. v. Hopkins, 264 U. S. 137, 44 Sup. Ct. 251, 68 L. ed. 593 (1924); Monamotor Oil Co. v. Johnson, 292 U. S. 86, 54 Sup. Ct. 575, 78 L. ed. 1141 (1934); Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S. W. 753 (1922); Standard Oil Co. v. Jones, 48 S. D. 482, 205 N. W. 72 (1925).

[7] 292 U. S. 86, 54 Sup. Ct. 575, 78 L. ed. 1141 (1934).

[8] Actually, the tax was levied on all gasoline imported, but in view of the provision that the tax should be refunded as to gasoline subsequently exported from the state it was not considered a tax on importation alone, which would have been a burden on interstate commerce.

the imposition of that duty is not a burden upon interstate commerce when the corporation, as in the principal case, has an agent in the state but contracts with and ships directly to individual consumers. This additional step was taken in *Felt & Tarrant Mfg. Co. v. Corbett*[9] where a federal district court upheld as valid the imposition upon the complainant, an Illinois corporation, of a requirement of the California Use Tax Act[10] that it should, as a retailer maintaining a place of business within the state within the meaning of the Act, collect the use tax on goods it sold in California. Although sales offices were maintained in California, all orders for goods were filled from complainant's Illinois office, shipment usually being made directly to the purchaser; and all payments by the purchasers were made directly to the complainant at its Illinois office. The court refused to grant complainant an injunction against the enforcement of this provision of the Act, and dismissed the contention that it violated the commerce clause and the 14th Amendment by saying: "In this respect, we are unable to distinguish the statute here involved from the one upheld in the case of Monamotor Oil Co. v. Johnson."[11] Though the court in the *Felt* case relied entirely on the *Monamotor* case and made no distinction between the two fact situations, there exists a further distinction which has received some recognition from the United States Supreme Court.[12] In the *Monamotor* case although it did not appear that the purchaser made his payment to the agent located within the state, gasoline taxes are usually handled in this way, while in the *Felt* case all payments were made outside the state. These distinctions should be of no importance in determining whether such a collection provision is a burden upon interstate commerce, when the tax itself is free of such a defect.

The question remains as to the power of the state to revoke the license to do business of the local retailer for failure to collect a tax due from the extrastate mail-order business in which it took no part. It might be objected that the revocation of the complainant's license for

[9] 23 F. Supp. 186 (S. D. Cal. 1938).
[10] CAL. GEN. LAWS (Deering, 1937) Act 8495a.
[11] 23 F. Supp. 186, 191 (S. D. Cal. 1938).
[12] In New York, L. E. & W. R. R. v. Pennsylvania, 153 U. S. 628, 14 Sup. Ct. 952, 38 L. ed. 846 (1894), the United States Supreme Court held unconstitutional a requirement that a foreign corporation doing business within the state should withhold an intangible tax from bond interest paid to resident bondholders when such interest was payable outside the state. Though the basis for the decision was that there was an impairment of a contractual obligation existing between the state and the railroad company, the Court nevertheless made a point of the fact that the state could not compel such action when the transaction sought to be affected was conducted outside the state. But in Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 Sup. Ct. 228, 64 L. ed. 460 (1920), the Court upheld a provision requiring a foreign corporation doing business within the state to withhold an income tax from the salaries of non-resident employees, the salaries being earned in that jurisdiction and being capable of payment within the state.

failure to comply with this provision is a deprivation of property without due process of law. By way of dictum in the principal case the court said: The revocation of a license to do business in a State does not in all cases, if ever, deprive the licensee of property without due process in violation of the 14th Amendment."[13] In *Hammond Packing Co. v. Arkansas*[14] the United States Supreme Court upheld the constitutionality of an Arkansas statute providing for license revocation as applied to a foreign corporation doing business in Arkansas which, outside of that state, entered a pool to regulate prices in states other than Arkansas. The Court considered the right to revoke the licenses of foreign corporations to be plenary, capable of being exercised in consideration of acts done in another jurisdiction, the motive of the legislature being, for purposes of due process, immaterial. This authority, which is in accord with other decisions,[15] upholds the power of the state to regulate, within constitutional limitations,[16] the out-of-state activities of foreign corporations doing business within its boundaries, and to revoke their licenses for failure to submit to such regulation.

The *Monamotor* case has been criticised[17] as giving only slight consideration to the merits of the problem of the validity of a statute burdening a seller in interstate commerce with the collection of a tax, even though the tax be valid; and the same criticism would apply equally as well to the *Felt* case.

If the collection provision of the statute should be enforced against an out-of-state mail-order company maintaining retail stores within the state, the company might seek to avoid collecting the tax by incorporating such stores. But the Iowa Act anticipates such an expedient by making its definition of retailers (which would include mail-

[13] 23 F. Supp. 321, 325 (S. D. Iowa 1938). But a federal district court held invalid as violative of the due process and equal protection clauses of the Constitution, a Washington statute providing for the cancellation of licenses of resident wholesalers purchasing products of non-resident brewers if the brewers refused to obtain wholesalers' licenses to do business in the state. Pacific Fruit & Produce Co. v. Martin, 16 F. Supp. 34 (W. D. Wash. 1936).

[14] 212 U. S. 322, 29 Sup. Ct. 370, 53 L. ed. 530 (1909).

[15] See Missouri Pac. Ry. v. Kansas, 216 U. S. 262, 274, 30 Sup. Ct. 330, 334, 54 L. ed. 472, 477 (1910); Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 83, 34 Sup. Ct. 15, 18, 58 L. ed. 127, 133 (1913); Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129, 137, 42 Sup. Ct. 42, 44, 66 L. ed. 166, 171 (1921); Paramount Pictures v. Langer, 23 F. Supp. 890, 900 (D. N. D. 1938).

[16] " . . . the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will." But not when " . . . the so-called right is used as part of a scheme to accomplish a forbidden result. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court; or to tax it upon property that by established principles the State has no power to tax; . . . or to interfere with interstate commerce." Fidelity & Deposit Co. of Maryland v. Tafoya, 270 U. S. 426, 434, 46 Sup. Ct. 331, 332, 70 L. ed. 664, 667 (1926).

[17] Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way* (1938) 38 COL. L. REV. 49, 78.

order houses) maintaining a place of business within the state, and therefore subject to the provisions of the statute, broad enough to include those maintaining "directly or by a subsidiary, an office . . . or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary".[18] By the application of this statutory definition to the Iowa subsidiaries of the foreign corporation, the Board could "look through" the corporate entity[19] for the purpose of enforcing the requirement that out-of-state mail-order companies collect the use tax on goods shipped to purchasers located within the state.

Considerable difficulty may be experienced by a state seeking to impose the duty of collecting a use tax upon a non-resident merchant who sells goods for consumption within the state without maintaining therein any place of business. Before such a requirement may be imposed, the state must be able to serve process upon some agent of the company, so that it may be brought within its jurisdiction.[20] Where the sales are made directly to consumers through mail-order contracts with companies maintaining no agent or agency within the state, no such collection requirement can be enforced, for the state has no means by which it can legally subject the out-of-state retailer to its control.

However, with regard to concerns that carry on an interstate business by employing agents or drummers to solicit orders, directing the orders to the home office for acceptance and delivery and also directing payment to be made to the home office, a state might be more successful even though such companies maintain no office, store, warehouse, distributing, or collecting agency within the state. The power of the states to regulate the activities of non-residents within their borders has received a great deal of attention by the Supreme Court of the United States in considering statutes[21] authorizing service of process upon some state official in actions against non-resident motorists. The Supreme Court established by these decisions[22] that a state may,

[18] Iowa Acts 1937, c. 198, §1(6).

[19] Buick Motor Co. v. City of Milwaukee, 48 F. (2d) 801 (C. C. A. 7th, 1931), *cert. denied*, 284 U. S. 655, 52 Sup. Ct. 34, 76 L. ed. 556 (1931); Palmolive Co. v. Conway, 56 F. (2d) 83 (C. C. A. 7th, 1932), *cert. denied*, 287 U. S. 601, 53 Sup. Ct. 8, 77 L. ed. 524 (1932) (where statute provided for looking through the corporate entity in case of an arrangement to evade taxes); Breckenridge, *Tax Escape by Manipulations of Holding Company* (1931) 9 N. C. L. REV. 189, 192; note (1931) 29 MICH. L. REV. 600; (1931) 31 COL. L. REV. 719.

[20] Some duly authorized agent of the company who is capable of receiving service on behalf of the company must be available to the officers of the state for such service.

[21] These statutes and the decisions affecting them are discussed at length in: Culp, *Process in Actions Against Non-Resident Motorists*, (1934) 32 MICH. L. REV. 325; Culp, *Recent Developments In Actions Against Nonresident Motorists* (1938) 37 MICH. L. REV. 58.

[22] Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927); Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259, 72 L. ed. 446, 57 A. L. R.

in the exercise of the police power, provide that non-residents who operate automobiles on her highways, even though engaged directly and solely in interstate commerce, shall be deemed to have appointed the secretary of state as agent to accept service of process. If the state should impose the same requirements on drummers engaged in interstate commerce, making them susceptible to service of process, either through service on the secretary of state as their agent or through a non-discriminatory requirement that all drummers, engaged in the promotion of interstate or intrastate business, register with the state for the purpose of being subjected to service of process, it might be possible that the courts would extend the due process view adopted in *Henry L. Doherty & Co. v. Goodman*[23] so as to make the process served on such agents effective as service on the principal. By subjecting the out-of-state principal to the jurisdiction of the state courts the tax officials might then recover judgment against it for failure to collect the tax on goods sold to purchasers within the state. Such judgment would be entitled to full faith and credit[24] in the courts of other states wherein the company has property subject to execution, provided the judgment procured through such a procedure be sustained as a valid one. The validity of such a procedure is purely speculative. In order that it be sustained it will be necessary for the courts, actuated by a desire to enable the states to secure a more efficient administration of their taxes, to distinguish such a statute from those attempting to subject a foreign company engaged exclusively in interstate business to a suit by any and all of the residents of the state as did the statutes invalidated in *Sioux Remedy Co. v. Cope*[25] and *Furst v. Brewster*.[26] Is it not possible that the Supreme Court might take a step beyond *Henneford v. Silas Mason Co.*[27] and *Monamotor Oil Co. v. Johnson*,[28] in which it upheld the validity of the use tax and its collection provisions, and further enable the states to secure a greater degree of efficiency in the use of a valid means to collect a valid tax?

FRANK THOMAS MILLER, JR.

Contracts—Releases for Personal Injuries—Rescission—Mistake.

In an action to recover damages for the injuries and death of *P's* husband by reason of *D's* negligence, *D* set up as an affirmative defense

1239 (1928); Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599, 77 L. ed. 1158 (1933), 88 A. L. R. 174 (1934).

[23] 294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935).

[24] Milwaukee County v. White Co., 296 U. S. 268, 56 Sup. Ct. 229, 80 L. ed. 220 (1935) (judgment for taxes entitled to full faith and credit).

[25] 235 U. S. 197, 35 Sup. Ct. 57, 59 L. ed. 193 (1914).

[26] 282 U. S. 493, 51 Sup. Ct. 295, 75 L. ed. 478 (1931).

[27] 300 U. S. 577, 57 Sup. Ct. 524, 81 L. ed. 814 (1937), cited *supra* note 5.

[28] 292 U. S. 86, 54 Sup. Ct. 575, 78 L. ed. 1141 (1934).

a release given by the deceased. There was evidence that the deceased and *D* had relied upon a statement by the latter's physician that the ill-effects of the accident were superficial and that, upon their gradual disappearance, deceased's recovery would be complete. Deceased had died five months later. To the plea of a settlement in bar of *P's* right of action, she replied, alleging mistake as to the extent of deceased's injuries in the execution of the release. There was a verdict for *P*, but the lower court was reversed for error in instructing the jury that a unilateral mistake would be sufficient to avoid the release.[1] According to the North Carolina court, a mistake, to have this effect, must be mutual. This view represents the weight of authority.[2]

It is well established that a mutual mistake as to a material fact is a sufficient ground for the rescission of a release of a claim for personal injuries[3] provided the parties did not intend to make a final settlement, so all-inclusive that mistake would be within the realm of the bargain.[4] A settlement in which the parties contract in conscious ignorance of the consequences of the accident and compromise with reference to unknown as well as known injuries is one in which mistake as to any injury is within the bargain since it relates to a factor that the parties had contracted about and considered in fixing the terms of the release. However, where the parties intend merely to settle for known injuries a mistake as to the extent of these injuries or the existence of other injuries will, of course, not be within the bargain. Consequently, courts, sympathetic to the position of the releasor laboring under mistake, tend to construe these agreements as of this type rather than as all-inclusive compromises.[5] Especially is this so where the releasee or his physician misrepresents, even though innocently, re-

[1] Cheek v. Southern Ry., 214 N. C. 152, 198 S. E. 626 (1938).

[2] Weathers v. Kansas City Bridge Co., 99 Kan. 632, 162 Pac. 957 (1917); see Reddington v. Blue, 168 Iowa 34, 43, 149 N. W. 933, 936 (1914); Dominicis v. United States Casualty Co., 132 App. Div. 553, 116 N. Y. Supp. 975, 976 (3d Dep't 1909); White v. Richmond & D. R. R. 110 N. C. 456, 461, 15 S. E. 197, 199 (1892).

[3] Texas & Pacific Ry. v. Dashiell, 198 U. S. 521, 25 Sup. Ct. 737, 49 L. ed. 1150 (1904); Great Northern Ry. v. Reid, 245 Fed. 86 (C. C. A. 9th, 1917); Southwest Pump & Mach. Co. v. Jones, 87 F. (2d) 879 (C. C. A. 8th, 1937); St. Louis I. M. & S. Ry. v. Hambright, 87 Ark. 614, 113 S. W. 803 (1908); Tatman v. Philadelphia, B. & W. R. R., 10 Del. Ch. 105, 85 Atl. 716 (Ch. 1913); Wolf v. Cudahy Packing Co., 105 Kan. 317, 182 Pac. 395 (1919). *Contra:* Morris v. Seaboard A. L. Ry., 23 Ga. App. 554, 99 S. E. 133 (1919); Lawton v. Charleston & W. C. Ry., 91 S. C. 332, 74 S. E. 750 (1911).

[4] Colorado Springs & I. Ry. v. Huntling, 66 Colo. 515, 181 Pac. 129 (1919); Cogswell v. Boston & M. R. R., 78 N. H. 379, 101 Atl. 145 (1917). Accord: Nygard v. Minneapolis St. Ry., 147 Minn. 109, 179 N. W. 642 (1920); Kowalke v. Milwaukee Elec. R. & L. Co., 103 Wis. 472, 79 N. W. 762 (1899); see Althoff v. Torrison, 140 Minn. 8, 11, 167 N. W. 119, 120 (1918) (Where the parties expressly agree that the release is to apply to unknown as well as known injuries, the releasor can not avoid the settlement on the ground of mutual mistake.) But see Dolgner v. Dayton Co., 182 Minn. 588, 593, 235 N. W. 275, 277 (1931).

[5] See 5 WILLISTON, CONTRACTS (rev. ed. 1937) 4348.

leasor's condition to him or there is any inequality of intelligence, education, or bargaining power unfavorable to the releasor.

When the court has persuaded itself that the release was intended to cover known injuries only, the next problem is to determine whether the mistake was as to fact or a matter of opinion.[6] In distinguishing mistakes of fact and of opinion, the courts define the former as mistakes relating to present or past events.[7] In a personal injury case, such a mistake would relate to the extent of an injury where unknown conditions exist[8] or to the existence of an independent injury.[9] Emphasis is placed upon the condition of the releasor which is unrealized at the time of the settlement. Relief is thus conditioned upon a negotiation of parties in unconscious ignorance of facts which, if known, would have influenced the contract. A mistake as to the probable development of a known injury with no unknown conditions is a mistake as to a matter of opinion, for it relates to future uncertain events.[10] Thus, when a releasee's physician represents that there will be a recovery within a certain period of time, a mistake as to the length of time, or as to recovery itself if complications arise, is treated as a matter of opinion.[11] Reliance thereon by the releasor will not be sufficient to avoid the release because the parties must have intended to settle all their conscious uncertainties, which would include matters of opinion, for they are of the essence of uncertainty.

The injuries suffered by the releasor in the principal case consisted of shock and severe bruises. His death was caused by heart failure, a condition which, when considered most favorably to *P's* case, "was hastened or accelerated by the injuries" received through *D's* negligence. In *Richardson v. Chicago, Milwaukee & St. Paul Railway*,[12] a case with similar facts, the releasor had died of Bright's disease con-

[6] See Tatman v. Philadelphia, B. & W. R. R., 10 Del. Ch. 105, 110, 85 Atl. 716, 718 (Ch. 1913); Poti v. New England Road Mach. Co., 83 N. H. 232, 235, 140 Atl. 587, 589 (1928).

[7] See Malloy v. Chicago Great Western R. R., 185 Iowa 346, 352, 170 N. W. 481, 483 (1919); Simpson v. Omaha & C. B. St. Ry., 107 Neb. 779, 782, 186 N. W. 1001, 1003 (1922); Freeman v. Croom, 172 N. C. 524, 528, 90 S. E. 523, 525 (1916).

[8] Steele v. Erie Ry., 54 F. (2d) 688 (W. D. N. Y. 1931); Southwest Pump & Mach. Co. v. Jones, 87 F. (2d) 879 (C. C. A. 8th, 1937); St. Louis-San Francisco Ry. v. Cauthen, 112 Okla. 256, 241 Pac. 188 (1924); *cf.* Louisville & N. Ry. v. Carter, 23 Ky. L. Rep. 2017, 66 S. W. 508 (1902); Nelson v. Minneapolis St. Ry., 61 Minn. 167, 63 N. W. 486 (1895).

[9] Lumley v. Wabash Ry., 76 Fed. 66 (C. C. A. 6th, 1896); Great Northern Ry. v. Reid, 245 Fed. 86 (C. C. A. 9th, 1917); Lion Oil Ref. Co. v. Albritton, 21 F. (2d) 280 (C. C. A. 8th, 1927).

[10] Richardson v. Chicago, M. & St. P. Ry., 157 Minn. 474, 196 N. W. 643 (1924); see Simpson v. Omaha & C. B. St. Ry., 107 Neb. 779, 782, 186 N. W. 1001, 1003 (1922).

[11] Nelson v. Chicago & Northwestern Ry., 111 Minn. 193, 126 N. W. 902 (1910); Carroll v. United Rys. of St. Louis, 157 Mo. App. 247, 137 S. W. 303 (1911); Davis v. Higgins, 95 Okla. 32, 217 Pac. 193 (1923).

[12] 157 Minn. 474, 196 N. W. 643 (1924).

tracted as a consequence of his injuries. The court upheld the release, treating the evidence as insufficient to warrant rescission, "mistakes in forecasting such consequences" being considered "mistakes of opinion, not of fact". Both here and in the principal case there was merely an unanticipated consequence of known injuries, not an unknown injury. In *Pass v. McClaren Rubber Company,*[13] the North Carolina court emphasized the fact that, to warrant avoidance of the release for innocent misrepresentaton, there had to be a clear case of misrepresentation at the time of the settlement as to the releasor's then present condition resulting from the injuries. In that case, a nerve complication was discovered subsequent to the releasor's settlement made in reliance on a representation by releasee's physician that the extent of his injuries was a simple fracture of the arm. The court did not consider whether, in the light of these facts, an independent unknown injury existed, even though such an inquiry would have been pertinent to a correct treatment of the case. In denying the releasor's right to avoid the settlement, the court treated the misrepresentation as an opinion for which the releasor, by "settling before the full extent of his injury had been ascertained", assumed the risk. These words support the conclusion that, if mistake were claimed as to a release executed in conscious ignorance of the facts relating to the releasor's condition, the release would be treated as an all-inclusive compromise.

In the principal case an independent unknown injury was neither alleged nor proved. *P* claimed mutual misapprehension of the parties as to the extent of deceased's known injuries, but the evidence seems to prove no more than mistaken opinion as to ultimate recovery. As there was, then, no ground on which to rescind the release, it should constitute a bar to the recovery of damages for the releasor's injuries and death.

NATHANIEL G. SIMS.

Estates by the Entirety—Creditors' Rights—Deed from One Spouse to the Other. Liens—Order of Attachment to After Acquired Property.

In 1927 *H* and *W,* husband and wife, acquired and held as tenants by the entirety a certain tract of land. In 1930 *H* confessed judgment in favor of *W,* which was docketed on October 1 of that year. On July 17, 1931 *W* executed and delivered to *H* a deed which purported to convey to him all her interest in said tract of land. The acknowledgments and privy examination were duly taken and the deed recorded. On July 18, 1931 *H* gave a deed of trust on the property. This instrument was subsequently foreclosed and the land sold to the plaintiff's

[13] 198 N. C. 123, 150 S. E. 709 (1929).

grantor. Thereafter *W* died and her administrator issued execution on the judgment for the purpose of selling said land in satisfaction thereof. Plaintiff then brought this suit to have the judgment declared not a lien on the land. *Held,* it is unnecessary to decide whether *W* could give *H* a valid deed to her interest in land held by the entirety because the judgment was docketed before the deed of trust was recorded and was therefore a prior lien on the land when acquired by *H* on the death of *W*.[1]

Although a few cases have held that a judgment is not a lien on property obtained subsequently thereto,[2] the majority of jurisdictions hold that a judgment is a lien on such property.[3] Most of these latter courts declare the judgment[4] or mortgage[5] to be a lien on subsequently acquired property the instant the debtor acquires title. A great majority of courts, including North Carolina, hold that judgments acquired and docketed at different dates attach simultaneously to after acquired property and are liens of equal standing.[6] North Carolina considers property acquired by one tenant by the entirety as a result of his surviving the other to be after acquired property within the meaning of the above rule.[7] The majority view seems to be the logical

[1] Keel v. Bailey, 214 N. C. 159, 198 S. E. 654 (1938).

[2] *In re* Marcus, 32 F. (2d) 719 (W. D. Pa. 1929); Steinfeld v. Copper State Mining Co., 37 Ariz. 151, 290 Pac. 155 (1930).

[3] Porter-Mallard Co. v. Dugger, 117 Fla. 137, 157 So. 429 (1934); Messinger v. Eckenrode, 162 Md. 63, 158 Atl. 357 (1931); Lowe v. Rierson, 201 Minn. 280, 276 N. W. 224 (1937); Johannes v. Dwire, 94 Mont. 590, 23 P. (2d) 971 (1933); Miller v. Case Threshing Machine Co., 149 Okla. 281, 300 Pac. 399 (1931); Muir v. Bosey, 23 Wyo. 46, 146 Pac. 595 (1915).

[4] Hertweck v. Hertweck, 180 Cal. 71, 179 Pac. 190 (1919); Isom v. Larsen, 78 Mont. 395, 255 Pac. 1049 (1927); Hulbert v. Hulbert, 216 N. Y. 430, 111 N. E. 70 (1916); Duke v. Law, 135 Ore. 360, 296 Pac. 45 (1931); Baker v. West, 120 Tex. 113, 36 S. W. (2d) 695 (1931).

[5] Rice v. Kelso, 57 Iowa 115, 7 N. W. 3 (1881).

[6] Hertweck v. Fearon, 180 Cal. 71, 179 Pac. 190 (1919); *In re* Hazard's Estate, 73 Hun. 22, 25 N. Y. Supp. 928 (Sup. Ct. 1893); Hulbert v. Hulbert, 216 N. Y. 430, 111 N. E. 70 (1916); Zink v. James River Nat. Bank, 58 N. D. 1, 224 N. W. 901 (1929); Relfe & Co. v. McComb, 39 Tenn. 558 (1859); Willis v. Downes, 46 S. W. 920 (Tex. Civ. App. 1898).

By a three to two decision in Moore v. Jordan, 117 N. C. 86, 23 S. E. 259 (1895), the court held that two judgments attach simultaneously to after acquired property of the judgment debtor regardless of the date of docketing. The position of the majority was followed without dissent in Johnson v. Leavitt, 188 N. C. 682, 125 S. E. 490 (1924); Linker v. Linker, 213 N. C. 351, 196 S. E. 329 (1938). The decision in the principal case did not specifically overrule the above-cited cases.

[7] "Where several judgments are taken against a husband or a wife individually, and at different times, no present lien attaches to property held by the entirety, but upon the death of either, the survivor acquires the entire legal title to such property, and the liens of the several judgments held against the survivor, if still active and unsatisfied, would then attach to said property, *eo instante* and at the very moment when the title vests in the judgment debtor in his or her individual right; hence, the previously taken judgments would all stand upon the same footing, and the proceeds of a sale thereunder would be distributed pro rata without reference to the priority of said judgments or to

result of the holding of a good many courts to the effect that neither a judgment[8] nor a mortgage[9] can be a lien on property until the debtor acquires title. Also, in view of the fact that there can be no reliance on the record until acquisition of title by the debtor, there seems to be no good reason for allowing prior recordation of one inchoate lien to place it ahead of another when neither was a lien at the time of recording and neither holder relied on the record.

Thus, the holding of the principal case to the effect that prior liens attach to subsequently acquired property in the chronological order of recordation seems to be contrary to both the majority view and previous North Carolina cases. The court in the principal case could have ignored the point on which it based its decision and still have given the judgment priority by applying either of two more desirable rules; (1) the rule that a judgment against a husband attaches to his interest (including his right of survivorship) in property held by the entirety, or (2) the rule that the interest of one spouse in land held by the entirety may be directly conveyed to the other so as to give the grantee title to the whole.

Estates by the entirety are based on the legal fiction that the husband and wife are one person.[10] Each has the use of the entire estate,[11] and title to the whole remains in the survivor.[12] The courts are divided on the question whether a spouse's interest in such an estate is subject to execution at the hands of his judgment creditors.[13] The majority hold that it is not[14] and in most cases even allow the spouses, by joint conveyance, to vest title in a grantee free and clear of the lien of judgments docketed against either spouse.[15] A numerical minority of the states allow judgment creditors to execute on an interest of the

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the time of their docketing." Johnson v. Leavitt, 188 N. C. 682, 686, 125 S. E. 490, 492 (1924).

[8] See note 4, *supra*.

[9] See note 5, *supra*.

[10] Chandler v. Cheney, 37 Ind. 391 (1871); Vinton v. Beamer, 55 Mich. 559, 22 N. W. 40 (1885); Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 207 S. W. 67 (1918); Matter of McKelway, 221 N. Y. 15, 116 N. E. 348 (1917); Matter of Lyon, 233 N. Y. 208, 135 N. E. 247 (1922); McCurdy v. Canning, 64 Pa. 39 (1870); McGee v. Henry, 144 Tenn. 548, 234 S. W. 509 (1921).

[11] See note 10, *supra*.

[12] See note 10, *supra*.

[13] (1931) 11 ORE. L. REV. 96.

[14] Hurd v. Hughes, 12 Del. Ch. 188, 190 Atl. 418 (Ch. 1920); Ohio Butterine Co. v. Hargrave, 79 Fla. 458, 84 So. 376 (1920); Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67 (1918); Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790 (1891); Harris v. Carolina Dist. Co., 172 N. C. 14, 89 S. E. 789 (1916); Johnson v. Leavitt, 188 N. C. 682, 125 S. E. 490 (1924); see Davis v. Bass, 188 N. C. 200, 205, 124 S. E. 566, 569 (1924). However, in Lewis v. Pate, 212 N. C. 253, 193 S. E. 20 (1937), the court allowed a judgment creditor of the husband to execute on the *usufruct* of lands held by the entirety.

[15] Johnson v. Leavitt, 188 N. C. 682, 125 S. E. 490 (1924); Beihl v. Martin, 236 Pa. 519, 84 Atl. 953 (1912).

husband in land held by the entirety.[16] Some of these hold that the only interest he has which is subject to execution is one-half the rents and profits of the land,[17] and others allow execution to issue against his right of survivorship.[18] North Carolina, by ruling that a husband has the right to possession and control of property held by the entirety, allows his judgment creditors to execute on all the rents and profits of the land for the joint lives of the spouses.[19]

Under the majority view the spouses, by taking title as tenants by the entirety, are able to put all their real property completely beyond the reach of their creditors.[20] Several of the minority courts deviate from this only by allowing the judgment creditors to execute on the *usufruct,* or part of the *usufruct* of the land.[21] It seems unwise from a social point of view to permit the spouses to keep their property beyond the reach of their creditors. In the principal case the North Carolina Court could have reached the same desirable result it did reach by holding that a judgment against a husband operates as a lien not only on the *usufruct* of land held by the entirety but also on the husband's right of suvivorship in such property. This would have made the judgment a lien on this right from the time of docketing, and it would, therefore, have been ahead of the subsequent deed of trust. However, such a rule as we have advocated would involve the overruling of previous North Carolina decisions.[22]

A minority of jurisdictions held that a husband's deed to himself and his wife operates to make them tenants by the entirety of the property conveyed.[23] The obvious explanation for this view is that the conveyance is regarded as being made by the husband to a separate fictitious person, husband and wife.[24] It has been suggested that the majority holding, which denies such effect to the deed,[25] is not entirely consistent with the theory on which tenancies by the entirety are based, namely that husband and wife are a separate legal entity.[26] In

[16] Moore v. Denson, 167 Ark. 134, 269 S. W. 609 (1924); Ganoe v. Ohmart, 121 Ore. 116, 254 Pac. 203 (1927); J. A. Steinberg Co. v. Pastive, 97 N. J. Eq. 52, 129 Atl. 201 (Ch. 1925).

[17] Moore v. Denson, 167 Ark. 134, 269 S. W. 609 (1924); Ganoe v. Ohmart, 121 Ore. 116, 254 Pac. 203 (1927).

[18] J. A. Steinberg Co. v. Pastive, 97 N. J. Eq. 52, 129 Atl. 201 (Ch. 1925).

[19] Lewis v. Pate, 212 N. C. 253, 193 S. E. 20 (1937).

[20] (1931) 29 MICH. L. REV. 788, 789. [21] See notes 17 and 19, *supra.*

[22] Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790 (1891); Johnson v. Leavitt, 188 N. C. 682, 125 S. E. 490 (1924); see Davis v. Bass, 188 N. C. 200, 205, 124 S. E. 566, 569 (1924).

[23] *In re* Klatzl's Estate, 149 N. Y. Supp. 794 (Surr. Ct. 1914); *In re* Vogelsang's Estate, 122 Misc. 599, 203 N. Y. Supp. 364 (Surr. Ct. 1924); Boehringer v. Schmid, 133 Misc. 236, 232 N. Y. Supp. 360 (Sup. Ct. 1928); (1929) 9 B. U. L. REV. 134. [24] (1929) 9 B. U. L. REV. 134, 137.

[25] Ames v. Chandler, 265 Mass. 428, 164 N. E. 616 (1929); Pegg v. Pegg, 165 Mich. 228, 130 N. W. 617 (1911); Michigan State Bank v. Kern, 189 Mich. 467, 155 N. W. 502 (1915). [26] (1929) 9 B. U. L. REV. 134, 137.

some states the decisions permit the husband to transfer his interest in an estate held by the entirety to a third person who becomes a tenant in common with the wife for the joint lives of the spouses.[27] Still other jurisdictions hold that the husband's deed to the wife of his interest in an estate held by the entirety is valid to vest title to the whole in the wife.[28] The principal objection to this holding is that it results in a violation of the unity of person theory. However, in view of the fact that this theory has already been the recipient of considerable violence, as shown by the above examples,[29] there seems to be no good reason for allowing it either to invalidate otherwise valid conveyances between the spouses, or force them to pursue a more circuitous route in order to transfer the interest of one to the other. By the formality of both conveying to a third person and having him convey back to one spouse, the desired result can be accomplished.[30] It could have been reached in the principal case by holding that the wife's deed vested title to the whole in the husband. The judgment would then have attached immediately and the deed of trust would have been subsequent thereto. However, this, the most justifiable basis upon which the North Carolina Court could have predicated its decision in giving the judgment priority, was cast aside as being immaterial. As a consequence the court ran counter to its own previous decisions regarding the attachment of liens to subsequently acquired property.[31]

J. NATHANIEL HAMRICK.

Evidence—Substantive Use of Character Evidence in Civil Actions in North Carolina—How Character May Be Proved.

In an action for damages for alienation of affections and criminal conversation, a witness for the plaintiff was allowed to testify that he had arrested the defendant for the commission of a misdemeanor. Another witness, the county recorder, was allowed to testify that the defendant had been tried in his court. *Held,* the trial court did not err in admitting this testimony. The witnesses had already testified as to the defendant's mental capacity, which was material on the issue of his liability for punitive damages. The evidence objected to was relevant to show the opportunities the witnesses had had to observe the defendant and form an opinion of his mental capacity, and the trial

[27] Schulz v. Zeigler, 80 N. J. Eq. 199, 83 Atl. 968 (1912); Zubler v. Porter, 98 N. J. Law 444, 120 Atl. 194 (1923).

[28] Meeker v. Wright, 76 N. Y. 262 (1879); Mart v. Scarmach, 65 Misc. 124, 119 N. Y. Supp. 449 (Sup. Ct. 1909).

[29] See notes 27 and 28, *supra.*

[30] Porobenski v. American Alliance Ins. Co., 317 Pa. 410, 176 Atl. 205 (1935),

[31] Moore v. Jordan, 117 N. C. 86, 23 S. E. 259 (1895); Johnson v. Leavitt, 188 N. C. 682, 125 S. E. 490 (1924); Linker v. Linker, 213 N. C. 351, 196 S. E. 329 (1938).

court carefully instructed the jury to restrict its consideration of the testimony accordingly.[1]

It is an almost universally accepted rule that evidence of character is inadmissible in civil actions for substantive purposes,[2] unless character is an issue in the particular case.[3] This general rule has been adopted and followed by the North Carolina courts, which have excluded evidence of the character, both of the parties to an action and of third persons,[4] unless "character is put directly in issue by the nature of the proceedings."[5] Two reasons have been advanced for the rule: (1) character evidence is ordinarily irrelevant to any of the issues in a civil action;[6] and (2) such evidence tends to confuse and mislead the jury as to what the issues in the case really are.[7]

The statement that character evidence is ordinarily "irrelevant" in a civil action is often confusing. The argument that "a very bad man may have a very righteous cause"[8] is obvious, but it is also obvious that a man of bad character is more apt to commit certain kinds of acts than a man of good character. Hence, if the doing of such an act is in issue in a civil action, evidence of the alleged doer's character should have some relevancy. The statement that character evidence is irrelevant, then, may mean that no act of that kind is in issue in the average civil action, or it may mean that, even if there is such an issue, the probative value of character evidence is so slight that it is outweighed by the second reason for the rule—that such evidence tends to confuse and mislead the jury. Both reasons may be questionable in some cases in which the rule is applied, at least by comparison with criminal actions in which such evidence is more freely admitted.

Another source of confusion in the decisions is the frequent use of the words "character" and "reputation" synonymously. A person's "character" is an actual quality possessed by him; his "reputation" is what others estimate his character to be.[9] A probable explanation of this confusion will appear from the ensuing discussion.

[1] Bryant v. Carrier, 214 N. C. 191, 198 S. E. 619 (1938).

[2] No attempt will be made in this note to discuss evidence of character for the purpose of impeaching witnesses.

[3] 1 WIGMORE, EVIDENCE (2d ed. 1923) §§64(4), 70-80.

[4] Heileg v. Dumas, 65 N. C. 214 (1871); Braswell v. Gay, 75 N. C. 515 (1876).

[5] McRae v. Lilly, 23 N. C. 118 (1840); Beal v. Robeson, 30 N. C. 276 (1848); Bottoms v. Kent, 48 N. C. 154 (1855); Norris v. Stewart, 105 N. C. 455, 10 S. E. 912 (1890); Marcom v. Adams, 122 N. C. 222, 29 S. E. 333 (1898); Wilson Lumber & Milling Co. v. Atkinson, 162 N. C. 298, 78 S. E. 212 (1913); Merrill v. Tew, 183 N. C. 172, 110 S. E. 850 (1922).

[6] Bottoms v. Kent, 48 N. C. 154 (1855); Clements v. Rogers, 95 N. C. 248 (1886); Sigmon v. Shell, 165 N. C. 582, 81 S. E. 739 (1914).

[7] Clements v. Rogers, 95 N. C. 248 (1886). A third reason which has sometimes been given for excluding character evidence is that it is extremely unreliable because of a natural reluctance to disparage one's neighbor openly. (1935) 13 TEX. L. REV. 531.

[8] Thompson v. Church, 1 Root 312 (Conn. 1791).

[9] For a discussion of this distinction, see State v. Ussery, 118 N. C. 1177, 24 S. E. 414 (1896).

The North Carolina Supreme Court has followed the general rule excluding evidence of character for substantive purposes in civil suits, although opinions might differ as to the consistency of its application. In *McRae v. Lilly*,[10] an action for damages for the seduction of the plaintiff's daughter, the defendant introduced evidence to show that the plaintiff consented to the seduction. The plaintiff then offered to prove, in rebuttal, that he was a man of good character and "of a modest and retiring disposition", but the trial court refused the offer, and this ruling was affirmed on appeal. The evidence offered was clearly for the purpose of proving character, not reputation, and might well have been considered relevant. In *Beal v. Robeson*,[11] an action for malicious prosecution, the plaintiffs attempted to prove that the assault and robbery for which the defendant had caused them to be indicted had never occurred, but that the defendant had merely gotten drunk, fallen from his horse, and hit his head upon a rock. The Supreme Court reversed the ruling of the trial court admitting evidence to show that the defendant "bore the character of being a sober man". Here the word character is used when reputation is evidently referred to, and again the evidence seems relevant, as judged by the standard of criminal cases. Likewise, the Court has repeatedly upheld the exclusion of character evidence, in civil suits, on the issues of undue influence,[12] fraud,[13] usury,[14] and breach of contract.[15]

Where "character is put directly in issue by the nature of the proceedings", character evidence is admissible. " 'Putting character in issue' ", according to the opinion in *Norris v. Stewart*, " 'is a technical expression, and confined to certain actions, from the nature of which the character of the parties is of particular importance' ".[16] The difficulty of applying the standard is apparent, both from the form of the statement, and from a comparison of the examples to follow with those given above. Specifically, under the North Carolina decisions, character is in issue in actions for wrongful death, where the character of the deceased is material in determining what his earnings would have been had he lived, such earnings being the basis for estimating damages;[17] in actions

[10] 23 N. C. 118 (1840). [11] 30 N. C. 276 (1848).

[12] Bottoms v. Kent, 48 N. C. 154 (1855); *In re* McKay, 183 N. C. 226, 111 S. E. 5 (1922).

[13] Clements v. Rogers, 95 N. C. 248 (1886); Norris v. Stewart, 105 N. C. 455, 10 S. E. 912 (1890); Wilson Lumber & Milling Co. v. Atkinson, 162 N. C. 298, 78 S. E. 212 (1913). [14] Cox v. Brookside, 76 N. C. 314 (1877).

[15] Merrill v. Tew, 183 N. C. 172, 110 S. E. 850 (1922).

[16] 105 N. C. 455, 458, 10 S. E. 912, 913 (1890), quoting Tilghman, C. J. in Anderson v. Long, 10 S. & R. 54, 61 (Pa. 1823). This may mean that character is in issue when relevant to an ultimate issue in the case, as distinguished from an evidentiary issue, but the cases do not seem to substantiate this.

[17] Kessler v. Smith, 66 N. C. 154 (1872); Bradley v. Ohio R. & C. R. R., 122 N. C. 972, 30 S. E. 8 (1898); Burns v. Ashboro & M. R. R., 125 N. C. 304, 34 S. E. 495 (1899); Poe v. Raleigh & A. A. L. R .R., 141 N. C. 525, 54 S. E. 406 (1906); Hancock v. Wilson, 211 N. C. 129, 189 S. E. 631 (1936).

for slander, where the plaintiff's character is material on the issue of damages, since damages are determined by the amount of injury done to that character[18] (reputation is what is meant here, for obviously slander does not injure character), and on the issue of truth, if truth is pleaded as a defense, where the alleged slander charged the plaintiff with the commission of a criminal offense;[19] in actions for damages for breach of contract to marry, because the character of the plaintiff is material on the issue of whether or not the defendant should be excused from performance on the ground that the plaintiff is unchaste;[20] in actions to recover damages for seduction, as the character (or, preferably, the reputation) of the plaintiff and the plaintiff's family is material on the question of the degree of agony and suffering inflicted upon them by the seduction, such agony and suffering being the basis for estimating damages;[21] and, finally, in actions for separation and permanent allowance without divorce, under a statute which provides that these may be awarded where the husband is a drunkard or a spendthrift, separates himself from his wife and fails to provide for her according to his means and condition in life, or is guilty of any misconduct which would constitute grounds for divorce.[22]

If proof of character is allowed in a particular action,[23] the question then arises as to how character may be proved.[24] Since the character of an individual is an intangible quality which is impossible of determination through the media of the five senses, it can never be ascertained with absolute certainty, but is only subject to conjecture. An opinion as to what a person's character is must be based upon circumstantial evidence in the form of the conduct of the individual. The aggregate of the opinions formed by persons acquainted with his conduct constitutes the general reputation of the individual. Character, then, might be evinced by: (1) particular acts of conduct; (2) individual opinions based upon such conduct; and (3) general reputation.[25]

[18] Vick v. Whitfield, 3 N. C. 222 (1802); Sample v. Wynn, 44 N. C. 319 (1853); see Goodbread v. Ledbetter, 18 N. C. 12, 13 (1834).

[19] Burton v. March, 51 N. C. 409 (1859); McDougald v. Coward, 95 N. C. 368 (1886).

[20] Gaskill v. Dixon, 3 N. C. 350 (1805).

[21] McCauley v. Birkhead, 35 N. C. 28 (1851).

[22] Rodman v. Rodman, 198 N. C. 137, 150 S. E. 874 (1929). In this case both parties were allowed to introduce evidence tending to prove their character, and the plaintiff further showed that the defendant had a reputation for "being mean to his wife". While this evidence does tend to prove conduct which the statute sets forth as grounds for recovery, it does not seem that character should be in issue in this type of action any more than it is in actions for fraud or undue influence.

[23] For a discussion of the admissibility of character evidence in criminal cases in North Carolina, see note (1924) 2 N. C. L. REV. 170.

[24] While most of the rules governing the methods of proving character in North Carolina have been set forth in criminal cases, there is no apparent reason why the same rules would not apply in civil cases.

[25] See 1 WIGMORE, EVIDENCE §§52, 53, 193, 202.

Evidence of specific acts of conduct, while it does in fact tend to prove character, is rarely admitted for that purpose because: (1) the fact that an individual has committed one or two particular acts does not *necessarily* prove character;[26] (2) such evidence tends to confuse and mislead the jury by raising collateral issues;[27] (3) an individual would experience little difficulty in procuring evidence to defend himself against perjured testimony concerning his general reputation, but it would be practically impossible, on short notice, to obtain witnesses who could rebut perjured testimony as to the commission of a particular act alleged to have been committed at any time in the course of an entire lifetime;[28] (4) the jury may believe that the person whose character is in issue committed the act on which the litigation centers simply because he is a person likely to commit such an act, without taking into consideration any other circumstances shown;[29] and (5) if the person whose character is being proved is a party to the action, there is a high degree of danger that the jury will penalize him for the acts shown in proving character, whether he committed the act with which the litigation is concerned or not.[30] And, since evidence of specific acts is inadmissible, evidence of a report or rumor concerning a specific act is likewise inadmissible.[31]

An exception to the rule excluding proof of specific acts is usually made in prosecutions for seduction where the chastity of the seducee is a necessary element, for the obvious reason that a single act destroys chastity.[32] And, in like manner, evidence showing that the prosecutrix had never committed an act which would destroy her chastity is admissible.[33]

The second method by which character might be proved—personal opinions of those who know the individual whose character is in issue—is excluded by the opinion rule.[34]

[26] Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154; Tillotson v. Currin, 176 N. C. 479, 97 S. E. 395 (1918); Hill v. Hill, 196 N. C. 472, 146 S. E. 138 (1928).

[27] State v. Laxton, 76 N. C. 216 (1877); State v. Bullard, 100 N. C. 486, 6 S. E. 191 (1888); Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154 (1890); State v. Austin, 108 N. C. 780, 13 S. E. 219 (1891); State v. Holly, 155 N. C. 485, 71 S. E. 450 (1911); Tillotson v. Currin, 176 N. C. 479, 97 S. E. 395 (1918); Hill v. Hill, 196 N. C. 472, 146 S. E. 138 (1928).

[28] State v. Bullard, 100 N. C. 486, 6 S. E. 191 (1888); Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154 (1890); State v. Holly, 155 N. C. 485, 71 S. E. 450 (1911); Tillotson v. Currin, 176 N. C. 479, 97 S. E. 395 (1918); Hill v. Hill, 196 N. C. 472, 146 S. E. 138 (1928). [29] 1 WIGMORE, EVIDENCE §194(2).

[30] *Ibid.* This reason is especially applicable to criminal cases, but not inapplicable to civil cases.

[31] Luther v. Skeen, 53 N. C. 356 (1861); State v. Laxton, 76 N. C. 216 (1877); State v. Austin, 108 N. C. 780, 13 S. E. 219 (1891); Marcom v. Adams, 122 N. C. 222, 29 S. E. 333 (1898); State v. Mitchell, 156 N. C. 653, 72 S. E. 792 (1911); State v. McLawhorn, 195 N. C. 327, 141 S. E. 883 (1928).

[32] 1 WIGMORE, EVIDENCE §205.

[33] State v. Fulcher, 176 N. C. 724, 97 S. E. 2 (1918).

[34] 4 WIGMORE, EVIDENCE §§1980 *et seq.* (where the rule is criticized); Bottoms v. Kent, 48 N. C. 154 (1855).

By the process of elimination, then, the only way in which character may ordinarily be proved is by evidence of general reputation. And this, no doubt, accounts for the confusion between character and reputation mentioned above. The North Carolina decisions have clearly set forth the steps to be followed in giving such evidence. Before a witness may testify as to the character of a person, he must first be asked if he knows that person's general reputation.[35] If he gives a negative answer, he can be questioned no further on the subject.[36] If he says he does know the person's general reputation, he may then be asked what that reputation is as to general character, and only as to general character.[37] Any testimony which he then gives must be confined to the individual's reputation among members of the community in which he resides,[38] and not among members of a particular group within the community;[39] and it must be confined to the reputation the individual bore at the time of, or before (but not too long before),[40] the commission of the act in question.[41] But, although the witness may be questioned only as to reputation for general character on direct examination, he may voluntarily qualify his testimony by stating what the individual's reputation is for particular traits.[42] And, for the purpose of testing his knowledge, he may be asked on cross-examination in what respects the reputation is good or bad,[43] and from what source

[35] State v. Coley, 114 N. C. 879, 19 S. E. 705 (1894); State v. Ussery, 118 N. C. 1177, 24 S. E. 414 (1896); State v. Mills, 184 N. C. 694, 114 S. E. 314 (1922); State v. Nance, 195 N. C. 47, 141 S. E. 468 (1927).

[36] State v. Wheeler, 104 N. C. 894, 10 S. E. 518 (1889).

[37] State v. Hice, 117 N. C. 782, 23 S. E. 357 (1895); State v. Hairston, 121 N. C. 579, 28 S. E. 492 (1897); State v. Thornton, 136 N. C. 610, 48 S. E. 602 (1904); State v. Wilson, 158 N. C. 599, 73 S. E. 812 (1912); State v. Morse, 171 N. C. 777, 87 S. E. 946 (1916); State v. McKinney, 175 N. C. 784, 95 S. E. 162 (1918); State v. Lovelace, 178 N. C. 762, 101 S. E. 380 (1919); State v. O'Neal, 187 N. C. 22, 120 S. E. 817 (1923); State v. Nance, 195 N. C. 47, 141 S. E. 468 (1927); see State v. Pearson, 181 N. C. 588, 589, 107 S. E. 305 (1921).

[38] State v. Smoak, 213 N. C. 79, 195 S. E. 72 (1937); *cf.* State v. Gee, 92 N. C. 756 (1885) (general repute among his associates).

[39] State v. Hodgin, 210 N. C. 371, 186 S. E. 495 (1936); State v. Smoak, 213 N. C. 79, 195 S. E. 72 (1937). *Contra:* State v. Malonee, 154 N. C. 200, 69 S. E. 786 (1910) (evidence of reputation among teachers and schoolmates admitted).

[40] State v. Patrick, 204 N. C. 299, 168 S. E. 202 (1933) (reputation of prosecutrix almost two years prior to time of alleged seduction inadmissible).

[41] State v. Johnson, 60 N. C. 151 (1863); State v. Holly, 155 N. C. 485, 71 S. E. 450 (1911).

[42] State v. Hairston, 121 N. C. 579, 28 S. E. 492 (1897); State v. Wilson, 158 N. C. 599, 73 S. E. 812 (1912); State v. Walker, 173 N. C. 775, 92 S. E. 328 (1917); State v. Butler, 177 N. C. 585, 98 S. E. 821 (1919); State v. Reagan, 185 N. C. 710, 117 S. E. 1 (1923); State v. O'Neal, 187 N. C. 22, 120 S. E. 817 (1923); State v. Fleming, 194 N. C. 42, 138 S. E. 342 (1927); State v. Nance, 195 N. C. 47, 141 S. E. 468 (1927); State v. McLawhorn, 195 N. C. 327, 141 S. E. 883 (1928).

[43] State v. Ussery, 118 N. C. 1177, 24 S. E. 414 (1896); State v. Hairston, 121 N. C. 579, 28 S. E. 492 (1897); State v. Wilson, 158 N. C. 599, 73 S. E. 812 (1912); State v. Nance, 195 N. C. 47, 141 S. E. 468 (1927).

he acquired his knowledge concerning it.[44] The redirect examination is then limited to the particular matters brought out on cross-examination.[45]

Where evidence of a particular character trait is admissible, the North Carolina Supreme Court has allowed evidence of an individual's reputation for having followed a particular course of conduct, apparently on the assumption that such a course of conduct is, or is evidence of, a character trait. Thus it may be shown that the person whose character is in question has a reputation for having engaged in activities such as selling liquor[46] or prostitution.[47] It is difficult to see how such lines of activity can be called character "traits", but they may indicate a propensity for lawlessness. Evidence of a course of conduct, therefore, should be admitted, for it has a greater tendency to prove character than does evidence of isolated acts; it is less likely to confuse the issues and mislead the jury; and, if false, it is easier to rebut than is evidence of particular acts.

The evidence in the principal case was admitted technically for the purpose of showing the opportunities of the witnesses to observe the defendant. As a practical matter, however, the average juryman would be far more affected by its tendency to prove the defendant's bad character, particularly where the defendant is charged with criminal conversation and alienation of affections. And, as character evidence, it would clearly be inadmissible under the rules discussed, because character was not in issue in the case, and because it was evidence of a particular act, proved only by the fact that he had been arrested and tried for such act. While the great weight of authority holds that evidence, admissible for one purpose, is not to be excluded simply because it would be inadmissible if offered for another purpose,[48] it would seem preferable to exclude it for all purposes where the probable prejudice engendered thereby in the minds of the jury is so great as to overcome its value for the purpose for which it is admissible.[49]

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[44] State v. Austin, 108 N. C. 780, 13 S. E. 219 (1891); State v. Holly, 155 N. C. 485, 71 S. E. 450 (1911).

[45] State v. Ussery, 118 N. C. 1177, 24 S. E. 414 (1896).

[46] State v. Cathey, 170 N. C. 794, 87 S. E. 532 (1915); State v. Atwood, 176 N. C. 704, 97 S. E. 12 (1918); State v. Butler, 177 N. C. 585, 98 S. E. 821 (1919); State v. Mills, 184 N. C. 694, 114 S. E. 314 (1922); State v. Reagan, 185 N. C. 710, 117 S. E. 1 (1923); State v. Fleming, 194 N. C. 42, 138 S. E. 342 (1927); State v. McLawhorn, 195 N. C. 327, 141 S. E. 883 (1928); *cf.* State v. O'Neal, 187 N. C. 22, 120 S. E. 817 (1923) (testimony concerning the defendant's "activities . . . trying to destroy the liquor business" excluded on the grounds that evidence of specific acts is inadmissible for purpose of proving character).

[47] State v. Wilson, 158 N. C. 599, 73 S. E. 812 (1912).

[48] 1 WIGMORE, EVIDENCE §§12, 215.

[49] See Cardozo, J., in Shepard v. United States, 290 U. S. 96, 54 Sup. Ct. 22, 78 L. ed. 196 (1933).

Executors and Administrators—Duty to Plead Statute of Limitations.

It is well recognized that on the death of a debtor the right to use the bar of the Statute of Limitations passes immediately to his personal representative acting as executor or administrator of the estate. The granting of this right of the decedent to the personal representative was evolved at an early date in England[1] and has been adopted as the law of this country. The question arises whether in acting for the estate he is likewise allowed the same discretion in waiving and tolling the Statute that the debtor himself enjoyed.

There is diversity of opinion as to whether the personal representative must plead the Statute of Limitations upon his own initiative whenever the remedy is available or stand personally liable for his failure to do so.[2] Theoretically, he stands in the shoes of the decedent and, therefore, it is his duty to pay all debts and clear the estate as the decedent would be presumed to have done. When the executor or administrator conscientiously feels that the claim presented is just and well founded or when the deceased contemplated and expressed a wish that the payment of the claim be made, it may be argued that the personal representative should not cause the deceased to "sin in his grave"[3] by pleading the Statute of Limitations. An argument to the contrary is that the personal representative is expected to protect the interests of the heirs, distributees, devisees, or legatees and promote their welfare by using every method available to preserve as large an estate as possible for them. Likewise, it may be urged that the duty of protecting *bona fide* creditors not barred by the Statute of Limitations falls upon the personal representative and that he must assure them

[1] 14 HALSBURY, THE LAWS OF ENGLAND (1910) §330.

[2] The majority view that the personal representative is under no duty to plead the Statute of Limitations is upheld by the following jurisdictions: McDonald v. Carnes, 90 Ala. 147, 7 So. 919 (1890); Scott v. Penn, 68 Ark. 492, 60 S. W. 235 (1900); Baker v. Bush, 25 Ga. 594 (1858); Trimball v. Marshall, 66 Iowa 233, 23 N. W. 645 (1885); Slattery v. Doyle, 180 Mass. 27, 61 N. E. 264 (1901); Hodgdon v. White, 11 N. H. 208 (1840); McNair v. Cooper, 174 N. C. 566, 94 S. E. 98 (1919); *In re* Claghorn's Estate, 181 Pa. 600, 37 Atl. 918 (1897). *Contra:* Dern v. Olsen, 18 Idaho 358, 110 Pac. 164 (1910); Clawson v. McCune, 20 Kan. 337 (1878); McGee v. Atkinson, 66 Mich. 628, 33 N. W. 737 (1887); Trotter v. Trotter, 40 Miss. 704 (1866); Jackson v. Stone, 155 S. W. 960 (Tex. Civ. App. 1913). In some states the personal representative's duty is determined by statute. CAL. CODE CIV. PROC. (Deering, 1937) §708 (which makes it the duty of the personal representative to plead the Statute of Limitations); MD. ANN. CODE (Flack, Supp. 1935) art. 93, §100 (personal representative given discretionary power in pleading the Statute). Georgia, Florida, and South Carolina follow a unique rule allowing the personal representative to waive the Statute of Limitations as to a debt barred during the lifetime of the debtor but making it his duty to plead the Statute as to a debt becoming barred after his death. Deans v. Wilcoxan, 25 Fla. 980, 7 So. 163 (1889); Crabtree v. Graham, 81 Ga. 290, 6 S. E. 426 (1888); Gibson v. Lowndes, 28 S. C. 285, 5 S. E. 727 (1887).

[3] See Halliburton v. Carson, 100 N. C. 99, 107, 5 S. E. 912, 914 (1888).

full and prompt payment, unprejudiced by any barred claims, the payment of which might result in serious depletion of the assets. These conflicting obligations of the personal representative to the decedent and to persons interested in his estate tend to explain the diversity of opinion as to his duty.

The North Carolina Statute of Limitations was first construed in 1797 to allow the personal representative to waive the Statute at his discretion as the decedent might have done.[4] This construction was followed[5] until 1891 when a statute[6] imposed the absolute duty to plead the Statute of Limitations in all cases in which the plea might be available, but two years later that statute was repealed,[7] and the law was restored to its former status. Parallel with the cases developing the law with respect to the duties of the personal representative as to claims barred by the Statute of Limitations, was a line of cases[8] concerned with his duties in regard to the payment of claims of such a nature as to fall within the common law presumption[9] of payment or the ten year Statute of Presumptions[10] applicable to sealed instruments. These claims, as a result of the elapse of the necessary number of years, were presumed to have been paid, but the presumption could be rebutted.[11] Some of the early North Carolina decisions indicated that although the personal representative would not be liable for not invoking the Statute of Limitations against these claims, he would be liable for paying them without invoking the presumptions unless he could affirmatively prove that the debts had not been paid.[12] The

[4] See Cobham v. Administrators, 3 N. C. 6, 7 (1797). The Statutes of Limitations then in force were: Laws of N. C. 1715, c. 48, §7; Laws of N. C. 1789, c. 23, §2.

[5] Leigh v. Smith, 38 N. C. 442 (1844); Barnawell v. Smith, 58 N. C. 168 (1859); Halliburton v. Carson, 100 N. C. 99, 5 S. E. 912 (1888); see Williams v. Maitland, 36 N. C. 93, 101 (1840).

[6] N. C. Pub. Laws 1891, c. 92.

[7] N. C. Pub. Laws 1893, c. 7.

[8] Williams v. Maitland, 36 N. C. 93 (1840); Barnawell v. Smith, 58 N. C. 168 (1859); Halliburton v. Carson, 100 N. C. 99, 5 S. E. 912 (1888).

[9] The common law presumption of the payment of an outstanding debt arose after a period of twenty years. See M'Culloch v. Dawes, 9 Dow. & Ry. 40 (K. B. 1826); Williams v. Maitland, 36 N. C. 93, 101 (1840).

[10] Laws of N. C. 1826, c. 65, §18.

[11] See Barnawell v. Smith, 58 N. C. 168, 172 (1859).

[12] See Williams v. Maitland, 36 N. C. 93, 101 (1840); Barnawell v. Smith, 58 N. C. 168, 172 (1859); Halliburton v. Carson, 100 N. C. 99, 107, 5 S. E. 912, 914 (1888). In the *Barnawell* case the court said at p. 171: "We do not doubt that an executor or an administrator has a discretion whether he will plead the ordinary statute of limitations to a claim against the estate of his testator or intestate, and that if he is satisfied that the claim is just, he is not bound to plead the statute in a suit against him at law. But we think the case is different where the alleged claim or debt is so old and stale, that the common or statutory law raises a presumption, of its having been paid, from the lapse of time. In such a case, the administrator, before he pays such a claim, ought to show that the presumption was untrue, and that it had not, in fact, been paid or satisfied. . . ."

Statute of Presumptions is no longer in effect in North Carolina.[13] Whether the common law presumption has been superseded by the comprehensive provisions of the modern Statutes of Limitations is not altogether clear. If it has not, personal representatives should be wary about paying claims barred by the Statute which are also sufficiently old to fall within the presumption.

The present law in North Carolina, as was the case before 1891, allows the personal representative to exercise his own discretion in asserting the Statute of Limitations as a defense to claims presented by creditors,[14] one qualification being that if he pays a barred claim he must act in perfect good faith.[15] Nor is he under any duty to plead the Statute in the absence of fraud or collusion when an action is brought against the estate by a creditor.[16] Where fraud, collusion, or bad faith is proved against him, he must personally bear the losses caused to the estate by his failure to take advantage of the Statute of Limitations,[17] but mere failure to plead the Statute does not of itself constitute collusive fraud.[18] There is no indication in the North Carolina cases that the personal representative's discretion in invoking the Statute of Limitations is not broad enough to permit him to satisfy his own personal claim against the estate after the statutory period has run. However, failure to assert the Statute might create a suspicion of bad faith.

This discretionary power of waiver vested in the personal representative can not be taken away by any action of the heirs, distributees, devisees, or legatees.[19] They are bound by his waiver in the absence of fraud and they cannot force him to use the defense even though their own interests are at stake.[20] It has further been held in Alabama that

[13] It has been replaced by a ten year Statute of Limitations on sealed instruments. N. C. CODE ANN. (Michie, 1935) §437. See Helm Co. v. Griffin, 112 N. C. 356, 358, 16 S. E. 1023, 1024 (1893); Brown v. Harding, 171 N. C. 686, 689, 89 S. E. 222, 224 (1916).

[14] Person v. Montgomery, 120 N. C. 111, 26 S. E. 645 (1897); Best v. Best, 161 N. C. 513, 77 S. E. 762 (1913); McNair v. Cooper, 174 N. C. 566, 94 S. E. 98 (1917); Twiddy v. Mullen, 176 N. C. 16, 96 S. E. 653 (1918); Coleman v. Van, 205 N. C. 436, 171 S. E. 639 (1933).

[15] Leigh v. Smith, 38 N. C. 442 (1844).

[16] Speer v. James, 94 N. C. 417 (1886); Lee v. McKoy, 118 N. C. 518, 24 S. E. 210 (1896); Person v. Montgomery, 120 N. C. 111, 26 S. E. 654 (1897); Hinton v. Pritchard, 126 N. C. 8, 35 S. E. 127 (1900); Best v. Best, 161 N. C. 513, 77 S. E. 762 (1913); McNair v. Cooper, 174 N. C. 566, 94 S. E. 98 (1917); Twiddy v. Mullen, 176 N. C. 16, 96 S. E. 653 (1918); Coleman v. Van, 205 N. C. 436, 171 S. E. 639 (1933).

[17] Person v. Montgomery, 120 N. C. 111, 26 S. E. 645 (1897); Twiddy v. Mullen, 176 N. C. 16, 96 S. E. 653 (1918).

[18] Best v. Best, 161 N. C. 513, 77 S. E. 762 (1913).

[19] Speer v. James, 94 N. C. 417 (1886); Lee v. McKoy, 118 N. C. 518, 24 S. E. 210 (1896); Hinton v. Pritchard, 126 N. C. 8, 35 S. E. 127 (1900); Mathews v. Peterson, 150 N. C. 134, 63 S. E. 721 (1909).

[20] Speer v. James, 94 N. C. 417 (1886); Lee v. McKoy, 118 N. C. 518, 24 S. E. 210 (1896); Hinton v. Pritchard, 126 N. C. 8, 35 S. E. 127 (1900);

these persons cannot on motion be made parties to a cause of action for the purpose of interposing the plea.[21] If the personal representative has waived his right to plead the Statute of Limitations and a judgment is rendered against him, such judgment will ordinarily be conclusive upon those who claim under the estate. When the administrator or executor petitions the court for permission to sell land, the heirs or devisees are made defendants, but they have no power to restrain the sale merely by pleading that the claim to be paid from the proceeds of the sale was barred by the Statute of Limitations when the original action on it was brought against the executor or administrator.[22] They may independently set up the Statute, but they can succeed only by proving that the judgment was rendered as a result of fraud and collusion or gross negligence on the part of the personal representative.[23] Where a creditor, having delayed filing his claim until after the assets have been distributed, seeks to recover from the distributees or legatees, presumably they may plead the Statute of Limitations,[24] although there is no case authority in point in North Carolina.

If an estate is insolvent, it may well be contended that creditors whose claims are not barred by the Statute of Limitations are entitled to have that defense urged against creditors whose claims are barred. Otherwise the *pro rata* share of the creditor whose claim is not barred may be materially reduced. In bankruptcy, this danger is recognized and guarded against. It is the duty of the trustee to plead the Statute of Limitations.[25] In the administration of insolvent deceased debtors' estates in North Carolina, apparently no exception is made to the general rule that it is within the discretion of the personal representative to assert the defense. But there is a method by which creditors may protect themselves. They may protect their inchoate interest in the assets of the estate by a creditor's bill[26] or by a creditor's special pro-

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Mathews v. Peterson, 150 N. C. 134, 63 S. E. 712 (1909). *Contra:* Syme v. Badger, 96 N. C. 197 (1897) (holding that realty was protected unless the action against the heirs was completed within the statutory period), *overruled by* Lee v. McKoy, *supra*.

[21] *Ex parte* Perryman, 25 Ala. 79 (1854).

[22] Best v. Best, 161 N. C. 513, 77 S. E. 762 (1913); Coleman v. Van, 205 N. C. 436, 171 S. E. 639 (1933).

[23] Smith v. Brown, 101 N. C. 347, 7 S. E. 890 (1888); McNair v. Cooper, 174 N. C. 566, 94 S. E. 98 (1917); Twiddy v. Mullen, 176 N. C. 16, 96 S. E. 653 (1918).

[24] Converse v. Nichols, 212 Mass. 270, 89 N. E. 135 (1909); Beekman v. Richardson, 150 Mo. 430, 51 S. W. 689 (1899); 3 WOERNER, THE AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) 1981.

[25] *In re* Resler, 95 Fed. 804 (D. Minn. 1899); *In re* Wooten, 118 Fed. 670 (D. N. C. 1902). The right to plead the Statute of Limitations is given to objecting creditors by judicial decision. *In re* Lafferty, 122 Fed. 558 (D. Pa. 1903).

[26] See Patterson v. Miller, 72 N. C. 516, 517 (1875).

ceeding which is provided by statute.[27] In either, the personal representative and all creditors may be made parties.[28] All claims are proved in court, and any creditor may object to the claim of any other creditor,[29] and may, as against him, invoke the defense of the Statute of Limitations.[30] This procedure may be resorted to even after a personal representative has decided to admit a claim barred by the Statute of Limitations but before there has been any distribution of the assets.[31]

It being settled that a personal representative may be justified in paying a claim barred by the Statute of Limitations or in suffering a judgment to be recovered against the estate for such a claim, the problem yet remains whether, without making any payment or suffering any judgment to be recovered, he may acknowledge a claim with the effect of reviving it if it is already barred, or of tolling the Statute of Limitations if it has not yet fully run. Apparently a mere acknowledgment, admission, or new promise by the personal representative with reference to a claim already barred is not binding upon the estate.[32] But if a claim which has not been barred is filed with the personal representative and is admitted by him, a North Carolina statute provides that it shall not be necessary for the claimant to bring an action against the estate to prevent the bar of the Statute of Limitations.[33] This admission need not be in writing,[34] may be implied,[35] and will prevent a successful plea of the Statute of Limitations by the heirs in a proceeding to sell property to make assets in order to pay the claim,[36] just as a judgment on a barred claim not contested by the personal representative will bind the heirs.

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[27] N. C. CODE ANN. (Michie, 1935) §§110-136.
[28] See Patterson v. Miller, 72 N. C. 516, 517 (1875).
[29] Oates v. Lilly, 84 N. C. 643 (1881); Dunn v. Beaman, 126 N. C. 766, 36 S. E. 172 (1900); see Wordsworth v. Davis, 75 N. C. 159, 162 (1876).
[30] See Wordsworth v. Davis, 75 N. C. 159, 162 (1876); Dunn v. Beaman, 126 N. C. 766, 769, 36 S. E. 172, 173 (1900).
[31] Oates v. Lilly, 84 N. C. 643 (1881).
[32] Oates v. Lilly, 84 N. C. 643 (1881); Whitehurst v. Dey, 90 N. C. 542 (1884); see Tucker v. Baker, 94 N. C. 162, 166 (1886); RESTATEMENT, CONTRACTS, N. C. ANNOT. (1934) §85, (1934) 13 N. C. L. REV. 56, 59. *Contra:* Billews v. Bogan, 2 N. C. 13 (1792); see Flemming v. Flemming, 85 N. C. 127, 128 (1881).
[33] N. C. CODE ANN. (Michie, 1935) §412.
[34] See Hinton v. Pritchard, 126 N. C. 8, 10, 35 S. E. 127, 128 (1900); Justice v. Gallert, 131 N. C. 393, 396, 42 S. E. 850, 851 (1902); RESTATEMENT, CONTRACTS, N. C. ANNOT. (1934) §85, (1934) 13 N. C. L. REV. 56, 60.
[35] See Woodlief v. Bragg, 108 N. C. 571, 573, 13 S. E. 211, 212 (1891); Turner v. Shuffler, 108 N. C. 642, 647, 13 S. E. 243, 245 (1891); RESTATEMENT, CONTRACTS, N. C. ANNOT. (1934) §85, (1934) 13 N. C. L. REV. 56, 60.
[36] Woodlief v. Bragg, 108 N. C. 571, 13 S. E. 211 (1891); Turner v. Shuffler, 108 N. C. 642, 13 S. E. 243 (1891); Hinton v. Pritchard, 126 N. C. 8, 35 S. E. 127 (1900).

Labor Law—Collective Bargaining Under the National Labor Relations Act.

In two recent cases[1] the federal courts have been called upon to consider the problem of collective bargaining under the Wagner Act. This is a comparatively new problem which is becoming increasingly important. The Wagner Act provides that employees shall have the rights of self-organization and collective bargaining,[2] and that it shall be an unfair labor practice for an employer to interfere with the exercise of these rights,[3] or to refuse to bargain collectively with representatives of his employees properly selected by a majority of the employees[4] constituting a unit appropriate for collective bargaining.[5] If the employer is reported by his employees to the National Labor Relations Board for having committed an unfair labor practice and is found guilty in a hearing before the Board, he may be ordered to cease and desist therefrom; and if he refuses, the order of the Board may be enforced in a federal circuit court of appeals by a restraining order and contempt proceedings.[6]

In addition to this power to prevent unfair labor practices, the Board may also determine the proper representative for bargaining purposes in case of a controversy.[7] In making this determination, the first problem which arises is: What constitutes an appropriate bargaining unit? The Act indicates no standards for deciding this question, but only provides that the Board shall do so in each case in a manner which will effectuate the purposes of the Act.[8] From a practical standpoint, it is necessary that there be some degree of similarity of working conditions in the group of employees on whose behalf the bargaining is to be done, as the grievances of various types of employees in a plant might be so different as to make it impossible for a single agency to bargain effectively in behalf of all. The Board has used a number of rather vague considerations, such as community of interest,[9] functional coherence,[10] craft,[11] geographical differences,[12] and whether em-

[1] National Labor Relations Board v. Biles Coleman Lumber Co., 98 F. (2d) 18 (C. C. A. 9th, 1938); National Labor Relations Board v. Hopwood Retinning Co., 98 F. (2d) 97 (C. C. A. 2d, 1938).
[2] 49 STAT. 452 (1935), 29 U. S. C. A. §157 (Supp. 1938).
[3] 49 STAT. 452 (1935), 29 U. S. C. A. §158(1) (Supp. 1938).
[4] 49 STAT. 452 (1935), 29 U. S. C. A. §158(5) (Supp. 1938).
[5] 49 STAT. 453 (1935), 29 U. S. C. A. §159(a) (Supp. 1938).
[6] 49 STAT. 453 (1935), 29 U. S. C. A. §160 (Supp. 1938).
[7] 49 STAT. 453 (1935), 29 U. S. C. A. §159(c) (Supp. 1938).
[8] 49 STAT. 453 (1935), 29 U. S. C. A. §159(b) (Supp. 1938).
[9] *In re* Chrysler Corp., 1 NLRB 164 (1936); *In re* Bell Oil and Gas Co., 1 NLRB 562 (1936).
[10] *In re* U. S. Stamping Co., 1 NLRB 123 (1936); *In re* Atlantic Refining Co., 1 NLRB 359 (1936).
[11] *In re* Ocean Steamship Co., 2 NLRB 588 (1937); *In re* P. Lorillard Co., 3 NLRB 529 (1937).
[12] *In re* Central Truck Lines, Inc., 3 NLRB 317 (1937): *In re* Biles Coleman Lumber Co., 4 NLRB 679 (1937).

ployees were on an hourly, tonnage, or piecework basis;[13] but as these terms are applied to the diverse situations present in different industries, it is impossible to draw any generalizations as to the make-up of an appropriate unit. In most cases, the Board accepts the unit presented without question unless this point is in controversy, in which case it has tended to favor the craft rather than the plant unit.[14]

Within the unit, the representative agency is to be chosen by the majority of the employees as the exclusive representative of all the employees in the unit.[15] This agency is usually a union, which then selects particular persons to do the actual negotiating with the employer, so that, in effect, representatives chosen by the union to which the majority of the employees belong are the exclusive representatives of all the employees in the unit, whether union members or not. When a substantial doubt exists as to the proper agency, the employer is under no duty to bargain until the Board has made its certification, provided he has made reasonable efforts to discover the proper representative.[16] In many cases it is clear what organization represents the majority, but in case of doubt, the controversy is usually submitted to the Board at the instance of the unions or the employees, the employer having no power to invoke the jurisdiction of the Board. The Board may then hold a hearing to investigate the controversy.[17] Ordinarily, an election is also held among the employees to determine what agency represents the majority,[18] but in some cases the Board makes its certification on the basis of investigation alone.[19] Although in many cases investigation would probably disclose which group has the better claim as the proper agency, in cases of substantial doubt, determination on the basis of investigation alone might prove inaccurate and would be very difficult without the aid of detailed information. Quite naturally, the procedure of the Wagner Act has occasioned sharp struggles for certifi-

[13] *In re* Consolidated Aircraft Corp., 2 NLRB 772 (1937); *In re* Sheba Ann Frocks, Inc., 3 NLRB 97 (1937).

[14] *In re* Globe Machine and Stamping Co., 3 NLRB 294 (1937); *In re* City Auto Stamping Co., 3 NLRB 306 (1937); *In re* Pennsylvania Greyhound Lines, 3 NLRB 622 (1937).

[15] 49 STAT. 453 (1935), 29 U. S. C. A. §159(a) (Supp. 1938), National Labor Relations Board v. Delaware-New Jersey Ferry Co., 90 F. (2d) 520 (C. C. A. 3d, 1937), *cert. denied*, 302 U. S. 731, 58 Sup. Ct. 141, 82 L. ed. 104 (1938).

[16] National Labor Relations Board v. Remington Rand, 94 F. (2d) 862 (C. C. A. 2d, 1938); Black Diamond S. S. Corp. v. National Labor Relations Board, 98 F. (2d) 875 (C. C. A. 2d, 1938).

[17] 49 STAT. 453 (1935), 29 U. S. C. A. §159(c) (Supp. 1938).

[18] *In re* Gate City Cotton Mills, 1 NLRB 57 (1935); *In re* International Nickel Co., 1 NLRB 907 (1936). However, the Board must conduct the election in fairness to all parties. Surpass Leather Co. v. Winters, 23 F. Supp. 776 (W. D. N. Y. 1938).

[19] *In re* Cosmopolitan Shipping Co., 2 NLRB 759 (1937); *In re* Pittsburgh Plate Glass Co., 4 NLRB 193 (1938). Section 159(c) of the Act provides that the Board may take a secret ballot or use any other suitable means to determine the proper representative.

cation as the representative agency between various labor unions when more than one is strongly represented in a plant or factory, and has served to create additional controversy in many cases between the A. F. of L. and the C. I. O. Following a policy of declining to interfere with the internal affairs of labor unions, the Board with the approval of the courts has held that when rival unions, both affiliated with the same national union, claim to be the proper representative of a group of employees, the parent union must settle the dispute.[20] When rival unions are affiliated with different parent unions, it is impossible to side-step the issue. The tendency to favor craft rather than plant units from which to select the bargaining agency has resulted in giving the A. F. of L. unions the advantage in most cases, as these unions are organized on a craft basis while those of the C. I. O. are organized on a plant basis without regard for the different trades represented therein.[21] In many instances, employers have attempted to protect themselves from outside unions by forming company unions which will almost inevitably represent the majority, as employees will usually be afraid not to join the company union even though they have no desire to do so. Because of this danger of coercion, the Board with the approval of the courts has uniformly held that the organization of company unions constitutes an unfair labor practice as interfering with self-organization.[22]

Once the proper agency for collective bargaining has been determined, the question arises as to when the employer has discharged the duty placed on him by the Act. In general terms it has been stated that there must be a *bona fide* attempt to reach an agreement even though none is actually reached,[23] but it has proved difficult for employers to satisfy this requirement. Obviously, an absolute refusal to negotiate with the union representing the majority does not constitute collective bargaining.[24] In cases where the employer refused to

[20] California State Brewer's Institute v. International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, 19 F. Supp. 824 (N. D. Cal. 1937); *In re* Aluminum Co., 1 NLRB 530 (1936); *In re* Axton-Fisher Tobacco Co., 1 NLRB 604 (1936).

[21] Note (1937) 47 YALE L. J. 122.

[22] National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, 58 Sup. Ct. 571, 82 L. ed. 524 (1938); National Labor Relations Board v. Carlisle Lumber Co., 94 F. (2d) 138 (C. C. A. 9th, 1937); National Labor Relations Board v. J. Freezer & Son, 95 F. (2d) 840 (C. C. A. 4th, 1938); *In re* Alaska Juneau Mining Co., 2 NLRB 125 (1936); *In re* Metropolitan Engineering Co., 4 NLRB 542 (1937).

[23] See Jeffrey-De Witt Insulator Co. v. National Labor Relations Board, 91 F. (2d) 134, 139 (C. C. A. 4th, 1937), *cert. denied*, 302 U. S. 731, 58 Sup. Ct. 55, 82 L. ed. 34 (1938); National Labor Relations Board v. Sands Mfg. Co., 96 F. (2d) 721, 725 (C. C. A. 6th, 1938); National Labor Relations Board v. Biles Coleman Lumber Co., 98 F. (2d) 18, 22 (C. C. A. 9th, 1938); *In re* Atlas Mills, 3 NLRB 10, 15 (1937).

[24] *In re* Black Diamond S. S. Corp., 3 NLRB 84 (1937); *In re* Suburban Lumber Co., 3 NLRB 194 (1937); *In re* Cating Rope Works, 4 NLRB 1100 (1938).

meet with the union, but was willing to bargain with the employees individually[25] or with a committee selected on the basis of proportional representation,[26] such action has been held to constitute a refusal to bargain collectively. It is suggested that the latter method, by which each union and also non-union employees would be represented on the bargaining committee in the ratio in which each group stood to the total number of employees in the plant, would be more equitable than that employed under the Wagner Act, as it would give the minority groups representation, which they do not have as the Act now stands. Merely meeting with the union without evidence of a real intent to enter an agreement does not satisfy the requirement that there must have been a *bona fide* attempt to reach an agreement.[27] In only one case before the Board has this requirement been considered satisfied, in which case the employer entered an actual agreement favorable to the union.[28] Where the employer has made counter-proposals unacceptable to the union, such proposals have been held not to have been made in good faith;[29] and, in most cases where some of the requests of the union have been granted, a distinction has been drawn between acceding to particular demands and collective bargaining, with the result that the employer was still held guilty of refusing to bargain collectively.[30] This attitude of the Board has been judicially disapproved on the ground that it is manifestly unfair to deprive the employer of freedom of contract by virtually binding him to enter an agreement, although the employees are left free to refuse to agree indefinitely.[31] This argument seems well founded, as it is almost impossible for the employer to escape the charge of unfair labor practices without acceding almost wholly to union demands, especially in view of the holding that reaching an impasse in the negotiations will not discharge him from his duty to bargain.[32] It seems that, in view of the burden in this respect placed on the employer, some degree of reasonableness in the negotiations should be required of the union also. This might be accomplished by discharging the employer from the duty of bargaining

[25] *In re* Atlantic Refining Co., 1 NLRB 359 (1936); *In re* Millfay Mfg. Co., 2 NLRB 919 (1937).

[26] *In re* Alaska Juneau Mining Co., 2 NLRB 125 (1936); *In re* Boss Mfg. Co., 3 NLRB 400 (1938).

[27] *In re* Canton Enameling and Stamping Co., 1 NLRB 402 (1936); *In re* Shell Oil Co. of Cal., 2 NLRB 835 (1937); *In re* Scandore Paper Box Co., 4 NLRB 910 (1938).

[28] *In re* Trenton Garment Co., 4 NLRB 1186 (1938).

[29] *In re* Atlas Mills, Inc., 3 NLRB 10 (1937).

[30] *In re* Bendix Products Corp., 1 NLRB 173 (1936); *In re* Timken Silent Automatic Co., 1 NLRB 335 (1936); *In re* St. Joseph's Stockyards Co., 2 NLRB 39 (1936).

[31] See Bendix Products Corp. v. Beman, 14 F. Supp. 58, 69 (N. D. Ill. 1936).

[32] Jeffrey-DeWitt Insulator Co. v. National Labor Relations Board, 91 F. (2d) 134 (C. C. A. 4th, 1937), *cert. denied*, 302 U. S. 731, 58 Sup. Ct. 55, 82 L. ed. 34 (1938).

further if the employees do not manifest the same *bona fide* intent to bargain which is required of him, and by giving him recourse to the Board if they continue to be unreasonable. The employer's duty is not excused by a strike, as the Act provides that the right to strike is not to be impaired by any provisions of the Act.[33] On the other hand, the employer is excused from further negotiation if the employees break a prior collective agreement,[34] or if they absolutely refuse to negotiate.[35] However, the employer has no means to compel the employees to negotiate and cannot seek redress from the Board, as can the employees.[36]

Questions as to the appropriate unit and agency and as to whether there has been a refusal to bargain collectively are questions of fact for the Board, whose findings thereon are binding upon the courts if supported by substantial evidence, the test of substantiality being the same as that presented in contesting a motion for a directed verdict in an action at law.[37]

Since the bargaining agency, when properly chosen, becomes the exclusive representative of all the employees in the unit,[38] it has been held that the employer is under no duty to bargain with the minority;[39] and, as a corollary to his duty to bargain with representatives of the majority, the courts have arrived at the conclusion that he has a corresponding *right* to do so, which may be protected by an injunction against a striking minority seeking to interfere therewith, provided the majority has been certified by the Board.[40] In granting injunctions in such situations, the courts are confronted with the Norris-LaGuardia Act, restricting issuance of injunctions in labor disputes.[41] But the

[33] 49 STAT. 457 (1935), 29 U. S. C. A. §163 (Supp. 1938), National Labor Relations Board v. Carlisle Lumber Co., 94 F. (2d) 138 (C. C. A. 9th, 1938), *In re* Pioneer Pearl Button Co., 1 NLRB 837 (1936).

[34] National Labor Relations Board v. Sands Mfg. Co., 96 F. (2d) 721 (C. C. A. 6th, 1938) (Although no direct means for enforcement of collective contracts is provided in the act, this may be an indirect means.)

[35] *In re* Seas Shipping Co., 4 NLRB 757 (1938).

[36] 49 STAT. 453 (1935), 29 U. S. C. A. §160 (Supp. 1938); Sharpe & Dohme, Inc., v. Storage Warehouse Employees Union, 24 F. Supp. 701 (E. D. Pa. 1938).

[37] Appalachian Electric Power Co. v. National Labor Relations Board, 93 F. (2d) 985 (C. C. A. 4th, 1938); National Labor Relations Board v. Wallace Mfg. Co., 95 F. (2d) 818 (C. C. A. 4th, 1938); National Labor Relations Board v. Bell Oil and Gas Co., 98 F. (2d) 870 (C. C. A. 5th, 1938) (in which it was also held that while the Board may hear incompetent evidence, it may not make an order based solely upon such evidence).

[38] 49 STAT. 453 (1935), 29 U. S. C. A. §159(a) (Supp. 1938).

[39] Mooresville Cotton Mills v. National Labor Relations Board, 94 F. (2d) 61 (C. C. A. 4th, 1938).

[40] Oberman & Co. v. United Garment Workers of America, 21 F. Supp. 20 (E. D. Mo. 1937); Union Premier Food Stores v. Retail Food Clerks and Managers Union, 98 F. (2d) 821 (C. C. A. 3d, 1938); note (1938) 36 MICH. L. REV. 844.

[41] 47 STAT. 70 (1932), 29 U. S. C. A. §101 (Supp. 1938), provides that the courts may not issue injunctions in labor disputes except in conformity with the provisions of the Act. 47 STAT. 73 (1932), 29 U. S. C. A. §113(c) (Supp.

Wagner Act makes the Norris-LaGuardia Act inapplicable to injunctions issued to enforce orders of the Board.[42] Therefore, when the Board has taken action certifying the majority and ordering the employer to bargain with it, the Norris-LaGuardia Act is inapplicable to an injunction against the minority issued to enforce the Board's order.[43] However, when no action has been taken by the Board the Norris-LaGuardia Act is applicable and its provisions must be satisfied,[44] the Wagner Act being inapplicable as the courts under the latter Act cannot protect collective proceedings between employer and employee unless they have been sanctioned by the Board.[45] The difficulty in this situation is that, as the employer cannot invoke the jurisdiction of the Board, he is powerless to protect himself if his employees strike in the course of a dispute as to which is the proper bargaining agency and refuse to submit the question to the Board.[46] This illustrates one of the principal defects in the Act—lack of protection to the employer in the face of unreasonableness on the part of the employees. The non-union minority is not much better off, for while it may still present grievances to the employer,[47] there is little chance that these demands will be met, especially if they conflict with those of the majority, with whom the employer is under a duty to bargain. Since the minority may be enjoined from striking when the Board has certified the majority, the right to strike is no longer available to the minority in such a situation. Obviously, this view is essential to the smooth working of the Act, but much of the difficulty might be avoided by giving the minority representation in the bargaining negotiations, perhaps on the basis of proportional representation.

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1938), defines a labor dispute as a controversy concerning conditions of employment or representation in negotiations, regardless of whether the disputants stand in the relation of employer and employee.

[42] 49 STAT. 453 (1935), 29 U. S. C. A. §160(h) (Supp. 1938).

[43] Oberman & Co. v. United Garment Workers of America, 21 F. Supp. 20 (E. D. Mo. 1937); Union Premier Food Stores v. Retail Food Clerks and Managers Union, 98 F. (2d) 821 (C. C. A. 3d, 1938); see Sharpe & Dohme, Inc., v. Storage Warehouse Employees Union, 24 F. Supp. 701, 702 (E. D. Pa. 1938).

[44] Grace Co. v. Williams, 20 F. Supp. 263 (W. D. Mo. 1937), *aff'd*, 96 F. (2d) 478 (C. C. A. 8th, 1938); Cupples Co. v. American Federation of Labor, 20 F. Supp. 894 (E. D. Mo. 1937); Donnelly Garment Co. v. International Ladies Garment Workers Union, 23 F. Supp. 998 (W. D. Mo. 1938); Sharpe & Dohme, Inc., v. Storage Warehouse Employees Union, 24 F. Supp. 701 (E. D. Pa. 1938). Nor can the majority union obtain an injunction unless the Board has passed on the controversy. Joel v. Rosseter, 15 F. Supp. 914 (N. D. Cal. 1936); Blankenship v. Kurfman, 96 F. (2d) 450 (C. C. A. 7th, 1938).

[45] Lund v. Woodenware Workers Union, 19 F. Supp. 607 (D. Minn. 1938).

[46] Sharpe & Dohme, Inc., v. Storage Warehouse Workers Union, 24 F. Supp. 701 (E. D. Pa. 1938).

[47] 49 STAT. 453 (1935), 29 U. S. C. A. §159(a) (Supp. 1938).

Mortgages—Statutes Modifying Deficiency Judgments—Availability to Sureties.

A North Carolina statute provides, in substance, that when a sale of real estate is made by ". . . a mortgagee, trustee, or other person authorized to make the same . . ." when such person or the holder of the obligation secured becomes the purchaser, in an action for a deficiency judgment ". . . against the mortgagor, trustor or other maker of any such obligation . . ." the defendant shall be allowed to show by way of defense or offset the true value of the property.[1] A recent North Carolina case raised, but apparently did not find it necessary to decide finally, the interesting question whether this provision is available as a defense to a guarantor of a note secured by a mortgage.[2] It is manifest that a solution does not lie in an interpretation of the language of the provision.

Statutory provisions similar to this one are not unusual,[3] the provisions having been enacted during the period when moratorium legislation was being considered in the several states. The policy of the statutes is, obviously, to protect distressed debtors from the rigors of a deflated real estate market. The question whether such statutes are available as a defense to sureties,[4] apparently, has arisen only in New York,[5] where express language would seem to apply for their benefit,[6]

[1] N. C. CODE ANN. (Michie, 1935) §2593(d).

[2] Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. 645 (1938).

[3] The constitutionality of these statutes is not within the scope of this note. See note (1937) 15 N. C. L. REV. 273. The statutes are of three types: (1) those which, like the N. C. statute, allow the fair market value to be shown as a defense or offset, ALA. CODE ANN. (Michie, 2d 1936 Supp.) §9028(3); N. Y. CIV. PRAC. (Cahill, Supp. 1936) §1083-a; S. C. Acts 1933, no. 264; S. D. Laws 1937, c. 208; (2) those which abolish deficiency judgments, Idaho Laws 1937, c. 31, §1; LA. GEN. STAT. ANN. (Dart, Supp. 1938) §5021.6; Mont. Laws 1937, c. 73, §9; NEB. COMP. STAT. (Kyle, Supp. 1937) §20-2141; N. D. Laws 1937, c. 159, §1; (3) those which provide a means for arriving at a fair foreclosure sale price, PA. STAT. ANN. (Purdon, Compact ed. 1936) tit. 21, §§809 *et seq.*; WASH. REV. STAT. ANN. (Remington, Supp. 1938) §1118; WIS. STAT. (Brossard, 1937) §281.206. North Carolina likewise has provisions of this latter type. N. C. CODE ANN. (Michie, 1935) §2593(b). For a thorough discussion see Poteat, *State Legislative Relief for the Mortgage Debtor During the Depression* (1938) 5 LAW & CONTEMP. PROB. 517.

[4] "Sureties" is used here and throughout the note to include technical sureties, guarantors, and indorsers. It is not believed that the legal distinctions between these types of third party obligors are relative to the problems under consideration.

[5] A surety is within the terms of the statute. Klinke v. Samuels, 264 N. Y. 144, 190 N. E. 324 (1934); Farmers' and Mechanics' Sav. Bank of Lockport v. Eagle Bldg. Co., 153 Misc. 554, 276 N. Y. Supp, 246 (Sup. Ct. 1934); Gaimari v. Horch, 249 App. Div. 537, 293 N. Y. Supp. 479 (1st Dep't 1937).

[6] Compare N. Y. CIV. PRAC. (Cahill, Supp. 1936) §1083-b, "In any action . . . commenced . . . against any person or corporation *directly* or *indirectly* (italics ours) or contingently liable . . . ," with N. C. CODE ANN. (Michie, 1935) §2593(d), ". . . shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation *whose property* [italics ours] has been so purchased. . . ."

as would the language of statutes of some other states.[7] On the other hand, a rather unusual provision in the North Dakota statute seems to preclude the use of the defense by sureties.[8]

Sureties, as well as their principals, in cases involving transactions prohibited by law are generally allowed to plead as a defense to their obligations the illegality of the transactions.[9] Thus under a statute prohibiting the execution of certain notes by a banking association, the surety on these notes was allowed the defense of the statute.[10] And in an action against the surety on a depository bond, the surety was allowed to plead by way of defense a federal statute which temporarily suspended payments on deposits.[11] In North Carolina it has been held that a surety on a bond given to support a "trade expansion" plan, in fact a lottery, could plead by way of defense the illegality of the transaction.[12] This defense was also allowed a surety on a bond to secure the payment of rent where the use of the premises was for an illegal purpose.[13] But these types of cases are to be distinguished from cases involving so-called "personal defenses", those available to the principal only. As to the latter, courts quite generally treat the principal's defenses of infancy, coverture, insanity, *ultra vires,* and discharge in bankruptcy as defenses available only to the principal; however, the cases are in conflict as to whether the principal's defenses of usury, fraud, duress, and the Statute of Limitations are available to the surety also.[14]

By reason of conflict in the cases and failure of courts to explain the reason for the results reached, it is difficult to state any principle, consistent with the cases, for determining what defenses of the principal are available to the surety. But it is submitted that the ultimate measure of the surety's liability should be the extent of his bargain. Any defense which may reasonably be said to be one the surety bar-

[7] See note 3, *supra,* group (2) and PA. STAT. ANN. (Purdon, Compact ed. 1936) tit. 21, §§806, 807 (plaintiff shall petition court to fix fair value). See also CAL. GEN. LAWS (Deering, 1937) Act 5101, §18.

[8] "Nothing herein contained shall be construed to postpone or affect any remedies the creditor may have against any party personally liable for the debt other than the contractor or purchaser and their successors in interest." N. D. Laws 1937, c. 159, §1.

[9] FEINSINGER, STEARNES' LAW OF SURETYSHIP (4th ed. 1934) §103.

[10] Swift v. Beers, 3 Denio 70 (N. Y. 1846).

[11] East Cleveland v. Fidelity & Deposit Co. of Md., 5 F. Supp. 212 (N. D. Ohio 1933). *Contra:* Commonwealth *ex rel.* Schnader v. United States Fidelity & Guaranty Co., 314 Pa. 140, 170 Atl. 686 (1934), (1934) 32 U. of PA. L. REV. 659. The latter case reached its result on the theory that the agreement was one of indemnity.

[12] Basnight v. American Mfg. Co., 174 N. C. 206, 93 S. E. 734 (1917). But *cf.* Poindexter v. Davis, 67 N. C. 112 (1872) (surety on bond executed to raise money to pay off a debt contracted to equip a Confederate company is liable since illegality is "too remote").

[13] Mound v. Barker, 71 Vt. 253, 44 Atl. 346 (1899).

[14] Note (1937) 46 YALE L. J. 833, 835.

gains to protect the creditor against should not be available to the surety.[15] Thus, it is properly held that lack of capacity in the debtor is no defense to the surety, for it is reasonable to suppose a surety contemplated protection of the creditor from non-payment arising from such a cause. For example, a surety is commonly procured on an infant's obligation for the very purpose of protecting the creditor should the debtor assert infancy as a defense.[16] Admittedly the principle above advanced is not consistent with cases which have held that the debtor's defenses of fraud, duress, usury, and the Statute of Limitations are not available to the surety. Obviously it cannot be said that the surety's bargain contemplated protection of the creditor against such defenses, for they are the result of the creditor's own acts. But it is submitted that these decisions are scarcely to be reconciled with any reasonable principle for determining when a defense of the debtor should be available to the surety.[17]

Can it be said that the surety's bargain reasonably contemplates protection of the creditor from defenses such as that raised by the statute involved in the instant case? The surety's bargain was to make the creditor whole, and since the theory of the statute is that the creditor should be charged with the value of the land which he obtains, why should the creditor be allowed a profit from the surety?[18] Further, if the policy of the statute be to relieve oppressed debtors where the debt has been reasonably satisfied, the surety is certainly within the class of the oppressed, especially where he is an accommodation

[15] But see *id.* at 836.

[16] President and Fellows of Harvard College v. Kempner, 131 App. Div. 848, 116 N. Y. Supp. 437 (2d Dep't 1909); Industrial Text-Book Co. v. Mabbot, 159 Wis. 423, 150 N. W. 429 (1915).

[17] Statute of Limitations cases present a situation analogous to that in the instant case. On authority of Knox County v. Blake, 2 Ohio St. 147 (1853), sureties on bonds of public officers are allowed, uniformly, their principal's defense, since such is necessary, because of the reimbursement problem, to carry out the policy of these special limitations. Sonoma County v. Hall, 129 Cal. 659, 62 Pac. 257 (1900). But where the creditor fails to file a claim against a bankrupt or decedent's estate, there is an almost equal uniformity of refusal to allow the principal's defense to the surety. Duerr v. Sloan, 50 Cal. App. 512, 195 Pac. 475 (1920); Armstrong v. Citizens' and Southern Bank, 145 Ga. 861, 90 S. E. 44 (1916). And such is true generally in the case of an ordinary suretyship on a claim against a living and solvent principal. United States v. Mercantile Trust Co. of Pittsburgh, 213 Pa. 411, 62 Atl. 1062 (1906). *Contra:* Auchampaugh v. Schmidt, 70 Iowa 642, 27 N. W. 805 (1886). But is not the policy of all types of limitation the same so far as any matter affecting the liability of the surety is concerned?

[18] *Cf.* Better Plan Building & Loan Ass'n v. Holden, 114 N. J. Eq. 537, 169 Atl. 289 (Ch. 1933). "The surety has just as much of an equitable right as the primary debtor to have the fair and equitable value of the premises which the mortgagee has acquired credited upon the mortgage debt." *Id.* at 541, 169 Atl. at 291. Of course, it may be argued in answer that the surety should pay and himself be subrogated to the right to obtain the land at its reasonable value. But in a mortgage transaction do not the parties contemplate that where there has been a foreclosure the surety's contract exists as a protection against a deficiency?

party, for there he has suffered all of the bitter without any of the sweet. His distress is expressly recognized in California where, by statute, the bringing of an action against a guarantor on a note secured by a mortgage or deed of trust is prohibited during the period of the emergency.[19] A New York provision went even further by absolutely prohibiting the mortgage guaranty business because of the tremendous losses suffered by these businesses, and the impossibility of determining feasible rates.[20]

It is obvious that one of two results will obtain if the surety cannot plead the statute involved in the principal case. Either he can or cannot seek reimbursement from the principal for the full amount paid the creditor. In either case the result is unsound. If the surety be held liable under the North Carolina statute for the full deficiency, and then is limited in his claim for reimbursement from the debtor to the deficiency above the fair value of the land, it is plain that the debtor's protection under the statute is at the expense of the surety, not the creditor.[21] Certainly the policy of the statute contemplates no such result. Further, the surety has been deprived of his contemplated reimbursement against the debtor. If, on the other hand, the surety is held liable and allowed full reimbursement, an equally undesirable result is obtained, for then the creditor is allowed to do indirectly that which he is prohibited from doing directly, and the principal is deprived of the benefit of the statute.[22]

It might be further argued that the effect of the statute is the same as payment which could be pleaded as a defense by the surety. The reasoning of such an argument is not believed to be sound since payment would seem to imply something more than the extinguishment of the debt,[23] especially where extinguishment results, not from an act of the parties, but by operation of law; however, in an interesting case in equity in New Jersey, without the benefit of a statute of this nature, the fair market value of the land foreclosed was credited to the debt where the mortgagee bought at a grossly inadequate price, and the surety was allowed to plead this defense as payment.[24]

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[19] CAL. GEN. LAWS (Deering, 1937) Act 5101, §18.
[20] CONSOLIDATED LAWS OF N. Y. (Cahill, 1931-35 Supp.) 798.
[21] See Klinke v. Samuels, 264 N. Y. 144, 147, 190 N. E. 324, 326 (1934).
[22] See Knox County v. Blake, 2 Ohio St. 147, 151 (1853).
[23] "It follows, therefore, that every act which, while it extinguishes the obligation, has also for its object the release of the debtor and his exemption from liability, is not payment. Payment is doing precisely what the payer has agreed to do." BOUVIER, LAW DICTIONARY (Rawles' Rev. 1914) 2540.
[24] Better Plan Building & Loan Ass'n v. Holden, 114 N. J. Eq. 537, 169 Atl. 289 (Ch. 1933); see Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198, 198 S. E 645, 646 (1938). Accord: Rohrer v. Strickland, 116 Va. 755, 82 S. E. 711 (1914).

Physicians and Surgeons—Coöperatives—Corporations Practicing Medicine—Insurance.

There has been much apparently justifiable criticism of the American medical system—criticism founded upon its failure to meet the needs for medical service, particularly among the low income classes.[1] With the idea of providing necessary medical attention for a fixed, predetermined rate payable at specified times, various remedial plans have been proposed and attempted with varying success[2]. Analysis of two such plans recently under judicial scrutiny serves as a fairly accurate indication of the attendant legal difficulties.

A California corporation for a specified premium contracted to pay under certain conditions for services rendered by physicians, hospitals, and medical laboratories. When a contractee needed the specified services he was treated by a physician selected from the corporation's approved list. The corporation was a stock company operated for profit, which solicited the purchase of its contracts by the general public, and paid commissions to its solicitors. In a *quo warranto* proceeding, *held,* the corporation was illegally practicing medicine.[3]

The other case involved a coöperative corporation known as the Group Health Association, Inc. Organized for civilian government employees (primarily HOLC workers, 65% of whom joined), it furnished almost complete medical service to its members and their families for a specified fee per month. The Association was a non-profit organization, which maintained a clinic with a staff of six doctors who were paid on a salary rather than a fee basis. *Held,* the corporation was not illegally practicing medicine, nor did it come within the scope of regulatory insurance laws.[4]

Whether by express enactment or by reason of judicial interpretations of statutes requiring a medical education, certificate of character, and a licensing examination, the well-settled rule is that a corporation cannot engage in the practice of dentistry or medicine,[5] though there

[1] COMMITTEE ON COSTS OF MEDICAL CARE, MEDICAL CARE FOR THE AMERICAN PEOPLE (1932) 1-35.

[2] COMMITTEE ON COSTS OF MEDICAL CARE, *op. cit. supra* note 1, at 73-101.

[3] People *ex rel.* State Board of Medical Examiners v. Pacific Health Corporation, Inc., 82 P. (2d) 429 (Cal. 1938).

[4] Group Health Ass'n v. Moor, 24 F. Supp. 445 (D. D. C. 1938); 83 CONG. REC. 3620 (1938) (contains facts as to organization not found in the case statement).

[5] Messner v. Board of Dental Examiners of Cal., 87 Cal. App. 199, 262 Pac. 58 (1927); Painless Parker v. Board of Dental Examiners of Cal., 216 Cal. 285, 14 P. (2d) 67 (1932); Pacific Employers Ins. Co. v. Carpenter, 10 Cal. App. (2d) 592, 52 P. (2d) 992 (1935); Benjamin Franklin Life Assur. Co. v. Mitchell, 14 Cal. App. (2d) 654, 58 P. (2d) 984 (1936); Masters v. Board of Dental Examiners of Cal., 15 Cal. App. (2d) 506, 59 P. (2d) 827 (1936); People v. Painless Parker Dentist, 85 Col. 304, 275 Pac. 928 (1929), *cert. denied,* 280 U. S. 566, 50 Sup. Ct. 25, 76 L. ed. 620 (1929); People v. United Medical Service, Inc., 362 Ill. 442, 200 N. E. 157 (1936); State v. Bailey Dental Co.,

is some lack of uniformity in the application of the rule.[6] The usual objections to the corporate practice of medicine are that: (1) a corporation under the control of profit-seeking laymen is not so easily amenable to the ethical standards of the profession; (2) the confidential relation between the doctor and the patient is destroyed; and (3) the doctor's responsibility, which should be entirely with the patient, is divided between the patient and the employer corporation.[7] Any lay controlled corporation organized for profit, including the defendant in the principal case from California, would seem to be objectionable on these same grounds, regardless of the particular scheme involved.[8] Con-

211 Iowa 781, 234 N. W. 260 (1931); People v. John H. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697 (1908).

[6] In State Electro-Medical Institute v. State, 74 Neb. 40, 103 N. W. 1078 (1905), the court held that a corporation, the stockholders of which were all doctors, could contract for the services of its members and other licensed physicians. The ruling was followed in State Electro-Medical Institute v. Platner, 74 Neb. 23, 103 N. W. 1079 (1905). In State v. Lewin, 128 Mo. App. 149, 106 S. W. 581 (1907), this same result was reached concerning a corporation in which the doctor who managed the organization and treated the patients owned 98% of the stock. Although in none of these cases did the court expressly rely on this ground, it should be noted that as the corporations were entirely, or almost entirely, owned and controlled by physicians, many of the objections to corporate practice of medicine by lay-controlled corporations did not exist. The reasoning relied on by the courts in these decisions was that the corporation itself did not render the services—it merely contracted with the doctor to have the services rendered. In the Nebraska case the court felt that statutory requirements for the practice of medicine were personal to the practitioner, and were passed to protect the public against incompetent practitioners. If corporate employees had their licenses this purpose would be served.

In holding unconstitutional a statute requiring one to submit to an examination and secure a license from the state board in order to run, own, or manage a dental office, the Washington court felt that society was sufficiently protected even though ownership and management were in unlicensed hands, if the actual dentistry was done by licensed men. State v. Brown, 37 Wash. 97, 79 Pac. 635 (1905). This view was substantially followed in Messner v. Board of Dental Examiners of Cal., 87 Cal. App. 199, 262 Pac. 58 (1927) in which it was held that as long as the professional aspects of the office were under professional control, the business aspects could be under lay control. In a later California case this position was taken by the dissent, but the majority refused to follow it. The decision indicates, though, that the majority felt that there was really no control of the professional aspects of the offices by professional men. Painless Parker v. Board of Dental Examiners of Cal., 216 Cal. 285, 14 P. (2d) 67 (1932).

As to the practice of optometry by a corporation hiring licensed optometrists to work for it there is a definite split of authority. Cases allowing it are: State *ex rel.* Att'y Gen. v. Gus Blass Co., 193 Ark. 1159, 105 S. W. (2d) 853 (1935); Georgia State Board of Exam'rs in Optometry v. Friedman's Jewelers, Inc., 183 Ga. 669, 189 S. E. 238 (1936); Jaekle v. L. Bamburger & Co., 119 N. J. Eq. 126, 181 Atl. 181 (Ch. 1935), *aff'd*, 120 N. J. Eq. 201, 184 Atl. 520 (1936). *Contra:* State v. Kindly Optical Co., 216 Iowa 1157, 248 N. W. 332 (1933); State *ex rel.* Bricker v. Buhl Optical Co., 131 Ohio St. 217, 2 N. E. (2d) 601 (1936); Neill v. Gimbel Bros., Inc., 330 Pa. 213, 199 Atl. 178 (1938). For a good discussion of this problem see note (1937) 11 TEMP. L. Q. 232.

[7] See note 5, *supra*. These objections are referred to in whole or in part in practically all of the cases forbidding corporate medical practice.

[8] COMMITTEE ON COSTS OF MEDICAL CARE, *op. cit. supra* note 1, at 96. In at least two cases involving substantially the same facts as the instant California case the doctrine has been applied: Pacific Employers Ins. Co. v. Carpenter, 10

ceding that in the face of modern acquisitiveness the maintenance of professional standards is desirable, commendable indeed is the general tendency of the judiciary to include all these types of schemes within a broad prohibition against corporate professional practice.

However, fundamentally different from the lay controlled, profit seeking corporation is the plan exemplified by the Group Health Association, Inc. In an article on "Cooperative Medicine and the Law"[9] it is pointed out that organizations of this sort, being non-profit, suffer little danger of any commercialism entailing a lowering of professional ethics. As the patients are the officers and stockholders, there is no risk of an undesirable division of the physician's responsibility and loyalty between his patients and his employers. Although a device of this sort to some degree eliminates the patient's free choice of a physician, the authors suggest that by voluntarily joining the organization the patient in effect chooses the doctors connected with it. He also has some voice in the selection of doctors because affiliated doctors are selected by trustees elected by the patient-stockholders. Moreover, as indicated, it is questionable whether actually the desirability of free choice of a doctor by the average person, who knows nothing about medicine, balances the advantages of having a committee select physicians after investigation and group inquiry as to their competence and desirability.

In the *Group Health Association* case the fact was not discussed that the organization of a non-profit coöperative is such as to remove the usual objections to corporate invasion of the professional realm, but it seems to have been recognized by the court.[10] The court in the principal California case recognized a fundamental difference between a non-profit, limited membership, incorporated coöperative association, and a lay controlled corporation catering to the general public with the profit motive.[11] There is, then, justification for the decision that the coöperative was not illegally practicing medicine.

The objection still must be met that insurance laws are being violated. Just what constitutes being in the insurance business is a matter concerning which there are widely varying interpretations.[12]

Cal. App. (2d) 592, 52 P. (2d) 992 (1935); Benjamin Franklin Life Assur. Co. v. Mitchell, 14 Cal. App. (2d) 654, 58 P. (2d) 984 (1936).

[9] Levy and Mermin, *Cooperative Medicine and the Law* (1938) 1 LAWY. GUILD Q. 194.

[10] Group Health Ass'n v. Moor, 24 F. Supp. 445, 446 (D. D. C. 1938) ("Such a corporation, *not for profit but for the mutual benefit of its members,* [italics added] is . . . not engaged in the practice of medicine.")

[11] People *ex rel.* State Board of Medical Exam'rs v. Pacific Health Corp., Inc., 82 P. (2d) 429, 431 (Cal. 1938).

[12] Illustrative of varying interpretations by different courts are the cases involving the Physicians' Defense Co. The same contract, whereby for certain premiums the corporation agreed to defend physicians in civil malpractice suits,

A recent note in this Law Review[13] points out that although the technical elements of insurance[14] are present, in determining if insurance laws apply courts often ask: (1) is there *control* in the contractor over the contingency involved—if so there is no insurance, (2) is the *purpose of the contract* primarily insurance—or does it only incidentally result in benefits technically similar to insurance, or (3) is the company of such a type that it should be subjected to insurance regulation, in other words, is there *necessity for regulation*?

In applying these tests to the devices exemplified in the principal cases, the tests of *control* and *purpose of the contract* stamp both organizations as engaged in the insurance business. However, consideration of the *necessity* of subjecting these devices to general insurance regulation suggests that although general insurance laws should be invoked against the California type of corporation[15]—assuming it overcomes the objection of illegal medical practice—the Group Health type of set-up should not be subject to these laws. Stringent statutory regulation of insurance has resulted from the rapid growth and widespread business of insurance organizations.[16] Its purpose has been to "protect policyholders against fraud, imposition, insolvency, and misappropriation of funds"[17] by insurance companies and their agents. Because of

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but not to assume liability for any judgments rendered, was passed on by courts of four jurisdictions. Saying that the element of indemnity was not present because the corporation assumed no liability for judgments rendered, two courts held the contract not to involve insurance. Vredenburgh v. Physicians' Defense Co., 126 Ill. App. 509 (1906); State *ex rel.* Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N. E. 567 (1905). Holding that the contingency of paying attorneys' fees and costs of defense was the risk or peril assumed by the corporation, two other courts held the contracts to be insurance agreements. Physicians' Defense Co. v. Cooper, 199 Fed. 576 (C. C. A. 9th, 1912); Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396 (1907). The court in the Ohio case held that although the corporation was not engaged in insurance, a certificate authorizing it to practice in that state should be refused because it would constitute the illegal practice of law by a corporation. In the Minnesota case the dissent argued that neither transaction of insurance nor illegal corporate practice of law were involved in the contract. On the latter point neither the majority in the Minnesota case nor in the other cases, except the Ohio case, had anything to say.

[13] Note (1937) 15 N. C. L. REV. 417.

[14] VANCE, INSURANCE (2d ed. 1930) 2 reads: "The contract of insurance, made between parties called the insured and the insurer, is distinguished by the presence of five elements:

(a) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.

(b) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils.

(c) The insurer assumes that risk of loss.

(d) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing similar risks.

(e) As consideration for the insurer's promise, the insured makes a ratable contribution to a general insurance fund, called a premium."

[15] COMMITTEE ON COSTS OF MEDICAL CARE, *op. cit. supra* note 1, at 96.

[16] MOWBRAY, *Insurance* in 8 ENCYC. OF SOCIAL SCIENCES (1932) 99.

[17] State *ex rel.* Dist. Att'y Gen. v. Mutual Mortuary Ass'n, Inc., 166 Tenn. 260, 264, 61 S. W. (2d) 664, 665 (1933).

the absence of the profit motive and high-pressure commission agents, and because of its small, limited membership, the Group Health type of organization seems substantially to lessen the probabilities of fraud, imposition, insolvency, and misappropriation of funds. The purpose of regulatory insurance laws is not to protect stockholders of small corporations from themselves, yet this would be the effect of applying general insurance laws to this coöperative. Also, to place this non-profit coöperative on the same plane with ordinary insurance companies, and to require large reserves, frequent reports, etc., would probably so increase the coöperative's expenses as to prevent it from providing low cost medical attention to low income groups[18]—an admittedly desirable aim. Should it be felt that the possibilities of fraud, etc. are not sufficiently removed it has been suggested that protection might be best achieved not by subjecting the organization to the general insurance laws—which might destroy the device—but by special legislation to assure that: "(a) the facilities of the association, both physical and personnel, would be adequate to provide proper care for the membership; (b) the membership fee would be large enough to give a reasonable assurance of the solvency of the association; (c) no one would be deceived as to what benefits accrue to membership, and the limits of the services provided."[19]

In urging that the coöperative plan not be denominated an insurance company, or a corporation illegally practicing medicine, it has been assumed that the device is a socially desirable one. If the plan can in some measure meet the great need for more widespread medical care, it can hardly be said to be other than socially desirable. After five years of intensive research, the Committee on Costs of Medical Care concluded: "No one fact is more clearly demonstrated . . . than this one: that the costs of medical care in any one year now fall very unevenly upon different families in the same income and population groups. The heart of the problem, therefore, is the equalizing of the financial impact of sickness."[20] According to the committee, for a small fee from each member per month, the cost of illness may be spread over a large group so as to make a great increase of medical care available to low income groups who heretofore could not bear the heavy cost burden of serious illness.[21] Too, it is obvious that group health service would present an excellent opportunity and incentive for increased application of preventive medicine.[22] Though it is not con-

[18] Levy and Mermin, *supra* note 9, at 206.
[19] *Id.* at 212.
[20] COMMITTEE ON COSTS OF MEDICAL CARE, *op. cit. supra* note 1, at 18.
[21] *Id.* at 133.
[22] *Id.* at 12. The reasons for insufficient use of preventive medicine are given as: (a) natural hesitation to seek medical aid unless driven to do so by discomfort or pain, (b) economic factors such as necessity to pay on a fee-for-

tended that this coöperative scheme will be a "cure all", it seems to have sufficient merit to warrant resolving in its favor doubts as to whether it constitutes illegal practice of medicine, or as to its character as insurance within the scope of general regulatory statutes.

JOSEPH M. KITTNER.

Res Judicata—Persons Concluded—Representative Parties.

P brought an action to recover for loss of services and expenses incurred as a result of *D's* allegedly negligent operation of an automobile which injured *P's* minor daughter. The trial judge dismissed the action on the ground that, in a previous action brought by *P* as next friend of his minor daughter to recover damages for her personal injuries, it had been determined that *D* was not negligent. The North Carolina Supreme Court reversed the judgment, holding that *P* was not such a party to the former action as to be concluded by the findings therein. Three justices dissented on the ground that *P's* participation in, and control over, the prior action made him a party for purposes of *res judicata*.[1]

Res judicata is the doctrine by which a final judgment rendered by a court of competent jurisdiction precludes the parties to the suit and their privies from "relitigating" (1) the same cause of action,[2] and (2) those matters which were actually in issue and determined.[3] In the first-mentioned application of the doctrine, where a second action is brought on the *same cause of action,* the judgment in the first action is conclusive of every matter which was, or might have been, asserted in support of the claim or defense in that action.[4] In other words, the judgment is an absolute bar to a second action on the same cause of action. But, in the second type of situation, where the two suits are on *different causes of action,* the judgment in the first suit is conclusive only of those matters which were actually determined in that action.[5] And such judgment may or may not have the effect of a bar, depending upon the materiality of the concluded matter to the cause of action asserted in the second suit.

service basis, (c) unavailability of facilities, and (d) reluctance of physicians to urge it because they do not want to appear to be soliciting business. The coöperative scheme under discussion would go a long way towards alleviating this situation.

[1] Rabil v. Farris, 213 N. C. 414, 196 S. E. 321 (1938).

[2] Eller v. Carolina & Northwestern Ry., 140 N. C. 140, 52 S. E. 305 (1905); Painter v. Norfolk & Western R. R., 144 N. C. 436, 57 S. E. 151 (1907); Ferguson v. Rex Spinning Co., 207 N. C. 496, 177 S. E. 640 (1934).

[3] Fowler v. Osborne, 111 N. C. 404, 16 S. E. 470 (1892); Garret v. Kendrick, 201 N. C. 388, 160 S. E. 349 (1931).

[4] See Cromwell v. Sac, 94 U. S. 351, 352, 24 L. ed. 195, 197 (1877).

[5] Cromwell v. Sac, 94 U. S. 351, 24 L. ed. 195 (1877).

It is fairly clear that the principal case is not governed by the first-mentioned application of the doctrine. In most jurisdictions it is held that the child's right to recover for personal injuries and the parent's right to recover for loss of services and expenses constitute separate causes of action,[6] the theory being that there has been an invasion of two different interests[7]—that of the child in bodily security, and that of the parent in the services of the child. Hence, recovery by the child of damages for personal injuries will not bar an action by the parent for loss of services;[8] nor will recovery by the parent defeat the action of the child.[9]

Since the determinative issue in the instant case—whether certain conduct of the defendant constituted negligence toward the child—was decided in the former suit, the second-mentioned branch of *res judicata* applies if other requirements are met. This leads to the inquiry: What persons are bound by findings in a previous action?

Subject to some exceptions,[10] only parties to the former action and their privies are bound thereby. A person is considered to have been a party when he was a party of record[11] or, under certain circumstances, when he participated in the suit.[12] He is also treated as a

[6] Karr v. Parks, 44 Cal. 46 (1872); Shields v. Audette, 119 Conn. 75, 174 Atl. 323 (1934); Slaughter v. Nashville, C. & St. L. Ry., 28 Ky. Law Rep. 665, 90 S. W. 243 (1906), *rehearing denied*, 28 Ky. Law Rep. 1343, 91 S. W. 713 (1906); Wilton v. Middlesex R. R., 125 Mass. 130 (1878); Forsythe v. Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731 (1899); see Burns v. Eminger, 84 Mont. 397, 405, 276 Pac. 437, 441 (1929).

[7] There is another theory having some support. In Callies v. Reliance Laundry Co., 188 Wis. 376, 206 N. W. 198 (1925), 42 A. L. R. 717 (1926), it was held that the only primary right invaded was that of the child, the parent's cause of action being derived from the child through assignment by operation of law. See Rabil v. Farris, 213 N. C. 414, 418, 196 S. E. 321, 323 (1938) (dissenting opinion). But if it is assumed that a separate action can be brought on the assigned portion of the claim, the origin of the cause of action would seem to have no bearing on the question in the principal case. Granted that, on the theory of the substantive law, the parent cannot recover unless the child can, and that the reason is founded on a rule of law as distinguished from a coincidence of fact, the question before us in the principal case still remains —can a determination in *another* action that the child cannot recover prevent the parent from showing, for the purposes of *his* action, that the child is entitled to recover, when the parent was only a nominal or representative party to the child's action?

[8] Karr v. Parks, 44 Cal. 46 (1872); Forsythe v. Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731 (1899).

[9] McNamara v. Logan, 100 Ala. 187, 14 So. 175 (1893); Slaughter v. Nashville, C. & St. L. Ry., 28 Ky. Law Rep. 665, 90 S. W. 243 (1906); see Reutkemeier v. Nolte, 179 Iowa 342, 351, 161 N. W. 290, 294 (1917).

[10] Persons not parties are bound by actions *in rem*. See McLurg v. Terry, 21 N. J. Eq. 225, 228 (Ch. 1870). The cases where a person is bound, even though not a party, because his obligation contemplates such a result are explainable on grounds other than *res judicata*. Slattery v. Schapero, 217 Mass. 71, 104 N. E. 440 (1914) (judgment against constable is conclusive on surety on his official bond because, the condition of the bond being broken when such judgment is rendered, the contract of the surety contemplates such a result); Otis v. St. Paul, 94 Minn. 57, 101 N. W. 1066 (1904).

[11] 1 FREEMAN, JUDGMENTS (5th ed. 1925) §430. [12] See notes 18, 21, *infra*.

party when he was represented by a party[13] or when he was under a duty to become a party to the suit.[14] Although parties of record are ordinarily bound in their individual capacities under the doctrine of *res judicata,* exceptions are made for nominal or formal parties,[15] and for those who sued or defended in a capacity other than a personal or individual one.[16] Thus a person is not bound individually when he was litigating another's rights, *i.e.,* acting in a representative capacity, unless he also litigated individual rights of his own.[17] In the principal case, whether the parent be deemed a nominal, or a representative, party to the child's suit, he should not, under these rules, be bound as a party of record by the former judgment; he was not litigating any of his own rights.

Before a person is held to have been a party by participation, he must have appeared openly,[18] must have been able to control and direct the proceedings,[19] and must have had "some substantial interest which he was promoting or defending in the case, other than a mere personal or general interest in the questions involved, or in the decision as a precedent."[20] It would seem that the requirements of control and openness of participation are easily met in the instant case—the next friend having complete control of the case, and his presence being attested by the record. But the requirement of interest in the suit is a real requirement. If the mere fact of participation were enough, the distinction between parties in their individual and representative capacities would be completely denied. The nature of the interest necessary to bind the participant is an illusive one; but generally the participant

[13] Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356, 41 Sup. Ct. 338, 65 L. ed. 673 (1921); Yarborough v. Moore, 151 N. C. 116, 65 S. E. 763 (1909); 1 FREEMAN, JUDGMENTS (5th ed. 1925) §435.

[14] This rule would seem to have little bearing on the principal case. It refers to persons who are liable over to a party to a prior suit and who are under a duty to appear when given notice. Lexington v. Aetna Indemnity Co., 155 N. C. 220, 71 S. E. 214 (1911). Unless such persons actually appear in the first suit, they can be concluded by the findings therein only in the action over against them. 1 FREEMAN, JUDGMENTS (5th ed. 1925) §430. But see Gadsden v. George H. Crafts Co., 175 N. C. 358, 368, 95 S. E. 610, 614 (1918).

[15] Walker v. Philadelphia, 195 Pa. 168, 45 Atl. 657 (1900); see Womack v. St. Joseph, 201 Mo. 467, 484, 100 S. W. 443, 447 (1907).

[16] Troxell v. Delaware, L. & W. R. R., 227 U. S. 434, 33 Sup. Ct. 274, 57 L. ed. 586 (1913); Travis Glass Co. v. Ibbetson, 186 Cal. 724, 200 Pac. 595 (1921); Bernard v. Merril, 91 Me. 358, 40 Atl. 136 (1898); Bamka v. Chicago, St. P. & O. Ry., 61 Minn. 549, 63 N. W. 1116 (1895).

[17] Corcoran v. Chesapeake Canal Co., 94 U. S. 741, 24 L. ed. 190 (1877) (trustee for certain bondholders was estopped, in a later suit brought by him as owner of some of the bonds, to controvert facts found in a suit where he represented the bondholders, since the trustee represented himself as one of the bondholders); Jenkins v. Nolan, 79 Ga. 295, 5 S. E. 34 (1887).

[18] If the opposing party does not know of the participation it would be inequitable to conclude him by the findings in the action; and, according to the requirement of mutuality, if he is not to be concluded it would be inequitable to conclude the participant. 1 FREEMAN, JUDGMENTS (5th ed. 1925) §433.

[19] *Ibid.*

[20] *Ibid.*

is found to have been directly affected by the outcome of the action, to have suffered or gained substantially as a result of the decision in the former suit.[21] He may have been affected because he had an interest in the subject-matter of the suit,[22] or because he was under an obligation conditioned in some way upon the outcome of the former action.[23] For example, the real owner of a negotiable note is bound by the findings in a suit against the maker by a plaintiff who had possession of the note, when the real owner appeared in that suit and defended for the maker on the ground that the plaintiff was not the owner.[24] Or where several insurance companies, issuing identical policies to a person, agree among themselves to share *pro rata* the expenses of all suits brought by the insured on the policies and appoint a committee to conduct the defense of such suits, each defendant is bound by the findings in any one of the suits.[25] The possibility of having to pay part of the costs gives each a sufficient interest in the suits to make it a party by participation. Again, where an injured person has an action against an insured tort-feasor and against the insurance company on insured's policy, if the insurance company defends the action against the tort-feasor, the findings therein are conclusive upon the insurance company in an action by the injured person against it on the policy.[26] The fact that the insurance company, if given notice to appear and defend, would be bound by the findings in such prior suit when asserted by the tort-feasor in an action for indemnity, gives the insurance company such an interest in the action against the tort-feasor as to make it a party when it does appear off the record. Since the parent, in the principal case, is not substantially or legally affected by the outcome of the child's action for damages for personal injuries, the parent should not be held a party by participation.

Even though not a party a person may be bound by a judgment in a prior action when he is in privity with a party thereto. Privity means "privity in estate" or "mutual or successive relationship to the same right of property".[27] A necessary requirement to establish privity with a party is that the privy must acquire his interest in the subject-

[21] Litchfield v. Crane, 123 U. S. 549, 31 L. ed. 199 (1887); Helm v. Zarecor, 213 Fed. 648 (D. Tenn. 1913); Parker v. Moore, 59 N. H. 454 (1879); notes Ann. Cas. 1916E, 151, (1912) 37 L. R. A. (N. S.) 957.

[22] Montgomery v. Vickery, 110 Ind. 211, 11 N. E. 38; Stoddard v. Thompson, 31 Iowa 80 (1870).

[23] See notes 25, 26, *infra*.

[24] Stoddard v. Thompson, 31 Iowa 80 (1870).

[25] Greenwich Ins. Co. v. N. & M. Friedman Co., 142 Fed. 944 (C. C. A. 6th, 1905).

[26] Metropolitan Casualty Ins. Co. of N. Y. v. Albritton, 218 Ky. 16, 282 S. W. 187 (1926).

[27] See Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U. S. 111, 129, 32 Sup. Ct. 641, 643, 56 L. ed. 1009, 1022 (1912); 2 BLACK, JUDGMENTS (1891) §549; 1 FREEMAN, JUDGMENTS (5th ed. 1925) §438.

matter of the former action *after* that action.[28] In view of the fact that the parent's rights are as complete before the child's suit as after it, and in view of the fact that the parent could sue before the child's action if he desired, it cannot be said that he is in privity with a party to that action.

While it appears that the decision in the principal case is in accord with all the cases on the point in holding that the doctrine of *res judicata* is inapplicable,[29] the objections to the result are apparent. The plight of the defendant, in having to submit to another jury the issue of his negligence after one jury had found in his favor, is provocative of sympathy; especially is this so when the later contest is, in reality, between the same persons. And the public interest might well require

[28] Womack v. St. Joseph, 201 Mo. 467, 100 S. W. 443 (1907); Gill v. Porter, 176 N. C. 451, 97 S. E. 381 (1918); Cressler v. Brown, 79 Okla. 170, 192 Pac. 417 (1920); 1 FREEMAN, JUDGMENTS (5th ed. 1925) §§438, 440.

[29] Shiels v. Audette, 119 Conn. 75, 174 Atl. 323 (1934); Hooper v. Southern Ry., 112 Ga. 96, 37 S. E. 165 (1917); Henry v. Missouri, K. & T. Ry., 98 Kan. 567, 158 Pac. 857 (1916); Balandran v. Compton, 141 Kan. 321, 41 P. (2d) 720 (1935); Akers v. Fulkerson, 153 Ky. 228, 154 S. W. 1101 (1913); McGreevey v. Boston Elevated Ry., 232 Mass. 347, 122 N. E. 278 (1919); Bamka v. Chicago, St. P. & O. R. R., 61 Minn. 549, 63 N. W. 1116 (1895); Scanlon v. Kansas City, 325 Mo. 125, 28 S. W. (2d) 84 (1930); Malsky v. Schumaker & Ettlinger, 7 Misc. 8, 27 N. Y. Supp. 331 (Common Pleas, N. Y. City and County 1894); Syczhk v. Szczerbaniewicz, 233 App. Div. 342, 252 N. Y. Supp. 780 (4th Dep't 1931); Bridger v. Asheville & S. R. R., 27 S. C. 456, 3 S. E. 860 (1887); Hall v. Waters, 132 S. C. 117, 128 S. E. 860 (1925); Guy v. Fisher & Burnett Lumber Co., 93 Tenn. 213, 23 S. W. 972 (1893); Scheiderer v. A. George Schulz Co., 169 Wis. 6, 171 N. W. 660 (1919). Cases where the next friend in the child's action was allowed to bind the same tort-feasor in his later action for loss of services are distinguishable, as far as the bare holding is concerned, in that they represent only a departure from the orthodox requirement of mutuality. Bradbury v. Humphrey, 162 Ill. App. 434 (1911); Brown v. Missouri P. R. R., 96 Mo. App. 164, 70 S. W. 527 (1902) (husband and wife), *overruled by* Womack v. St. Joseph, 201 Mo. 467, 100 S. W. 443 (1907); Morris v. Kansas City, 117 Mo. App. 298, 92 S. W. 908 (1906) (husband and wife) (also overruled by the *Womack* case); Anderson v. Third Ave. R. R., 9 Daly 487 (N. Y. 1881), *overruled by* Malsky v. Schumaker & Ettlinger, 7 Misc. 8, 27 N. Y. Supp. 331 (Common Pleas, N. Y. City and County 1894); Lindsay v. Danville, 46 Vt. 144 (1873) (husband and wife). These cases, except the Bradbury Case, were relied upon by the dissenting opinion in the principal case. Binding a person who was a party, in favor of a person who was not a party, to a prior action is very different from allowing a person who was a party to conclude one who was not. A person who was not a party is usually allowed to bind a party only when an indemnitee seeks to bind a plaintiff by findings in an action by such plaintiff against his indemnitor (in the broad sense of the word); but it has been urged that the requirement that the person in whose favor the estoppel is worked must have been a party to the prior action be done away with entirely. See note (1926) 35 YALE L. J. 607. Compare with the dissent in the principal case Lyon v. Rhode Island Co., 38 R. I. 252, 94 Atl. 893 (1915) (where defendant tort-feasor was allowed to introduce in evidence against the parent, in an action for damages for the parent's personal injuries, a transcript of testimony adduced in an action against same defendant brought by parent as next friend of his minor child for damages for personal injuries); Hartis v. Charlotte Electric Ry., 162 N. C. 236, 78 S. E. 164 (1913) (where a deposition taken in an action by husband and wife for her personal injuries was allowed to be introduced against the same defendant in an action by the husband as administrator).

an end to the litigation of that issue. But the opinion of the minority in the principal case, if followed, would not completely eliminate these objections. If the parent chose to bring his own action first, or if he chose not to act as next friend in the child's action if that action were brought first, he could deprive the defendant of the protection of the minority decision. And, if the parent's action were brought first, it does not seem that the defendant should be protected at the expense of binding the child by the judgment against his parent. The child would not have been a party, either of record, by representation, or as a participant, to the parent's former action. Thus, the effectiveness of the minority solution depends upon the will of the parent. But even as the law is today, if the parent is willing, the objections mentioned can be avoided. If the two actions were brought at the same time, although, under our present joinder provisions, they could not be joined,[30] they could probably be consolidated.[31] And there is authority to the effect that if the parent were to recover, or attempt to recover, damages for loss of services and expenses in the child's action, he could not later assert those same items in his own suit.[32] The minority opinion is open to the further objection that it might discourage persons from acting in a representative capacity in suits in which none of their individual rights are to be litigated, at least when such persons are free to decide whether they will so act.

Perhaps the objective which the minority seeks could be better achieved by abolishing the parent's cause of action, or by making joinder of the two causes of action compulsory. The question of whether either of these steps is desirable is beyond the scope of this note.

WILLIAM R. DALTON, JR.

[30] Thigpen v. Kinston Cotton Mills, 151 N. C. 97, 65 S. E. 750 (1909). This case applies the statutory provision in North Carolina that all the parties must be affected by each cause of action sought to be joined. N. C. CODE ANN. (Michie, 1935) §507. This requirement has been omitted from the joinder of causes section of the New York Civil Practice Act. N. Y. CIV. PRAC. ACT §258. See CLARK, HANDBOOK ON THE LAW OF CODE PLEADING (1928) 302.

[31] Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778 (1906).

[32] Bowring v. Wilmington Malleable Iron Co., 6 Penne. 332, 67 Atl. 160 (Del. Super. Ct. 1907); Daly v. Everette Pulp & Paper Co., 31 Wash. 252, 71 Pac. 1014 (1903); note (1925) 37 A. L. R. 64.